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# INTERESTED PARTIES: TIME TO CLEAR THE MUDDY WATERS FOR BID PROTESTERS

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# Interested Parties: Time to Clear the Muddy Waters For Bid Protesters

Barbara E. Shestko

## I. INTRODUCTION

In a perfect world, we would not need to guess who could challenge a bid protest action.[1] Unfortunately, the vehicle for such a challenge, the Administrative Dispute Resolution Act of 1996 (ADRA),[2] provides that only "interested parties" may challenge a procurement decision, yet it does not define the term "interested party." Because federal courts currently lack a consistent "test" for "interested party," whether or not a court entertains a bid protester's action depends not only on the forum selected but also the presiding judge. Accordingly, bid protesters lack a clear understanding of what standing challenges they will face in the federal courts.

Federal courts need a consistent approach in determining whom Congress intended to have standing under the new jurisdictional grant of the ADRA. While the United States district courts use normal standing principles applied in

[1] The current bid protest system allows the disgruntled offeror of goods or services to the government to contest procurement decisions at the General Accounting Office, the district courts, the Court of Federal Claims (COFC) and the governmental agency. However, this paper focuses on bid protests filed at the district courts and the COFC.

[2] Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a), 110 Stat. 3869, 3874 (1996)(codified at 28 U.S.C. § 1491 (b)(1)).

Administrative Procedure Act (APA)[3] cases to determine who may bring a bid protest action, the judges[4] at the Court of Federal Claims (COFC) are in less agreement on what standard to apply.

COFC decisions are split as to whether the court should strictly follow the Competition in Contracting Act of 1984 (CICA)[5] definition of "interested party" employed by the General Accounting Office (GAO). Whether the courts strictly apply this definition or only look to it for guidance is an important distinction, as a judge's adoption of the GAO's definition of "interested party" significantly narrows the courtroom door for protesters.

Limiting standing to only those bid protesters or disappointed offerors that can meet the GAO's restrictive definition of interested party has a detrimental effect on the integrity of the overall procurement system. Two important functions performed by the bid protest system are maintaining the integrity of the government procurement process and protecting the rights of protesters.[6] These important functions are necessary due to the fundamental differences between public and private procurement.

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[3] 5 U.S.C. § 702 (1994).

[4] Judges at the COFC are autonomous decision-makers and therefore are likely to produce more inconsistent results than the judges at the federal district courts.

[5] 31 U.S.C. § 3551(2) (1994).

[6] Jonathan R. Cantor, *Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*, 27 PUB. CONT. L.J. 155 (1997).

Perhaps the most influential difference is that the government procurement system lacks the monitoring and financial incentive schemes used by private firms in pressing purchasing agents to make efficient contracting choices.[7] Without these schemes, the government procurement system depends upon third party monitoring by bid protesters. The rationale is that since the government does not monitor its compliance with procurement regulations, bid protesters, acting as "private attorney generals," will keep government contracting officials honest.[8] Thus if the courts' threshold on standing is too stringent, it naturally follows that there will be fewer bid protesters and a less efficient government procurement system.

This paper proposes that instead of adopting the GAO restrictive definition of "interested party," the courts should equate interested party status under the ADRA with "aggrieved party" standing under the APA.[9] In supporting this conclusion, this paper examines the pre-ADRA bid protest jurisdictional landscape to determine whom Congress intended to have standing in the post-ADRA era. This historical

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[7] *See* William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L.J. AM. U. 461, 467 (1995).

[8] *See* Steven L. Schooner, *Who's Watching Now?* LEGAL TIMES S27 (April 26, 1999). *See also* Steven L. Schooner, *Protests Serve Public as Watchdog*, FEDERAL COMPUTER WEEK 17 (March 18, 1999).

[9] *See* 5 U.S.C. § 702 (1994)(requiring plaintiff to be "adversely affected or aggrieved by agency action with the meaning of the relevant statute").

survey is then followed by a review and analysis of recent federal court decisions interpreting "interested party" status.[10]

These federal court decisions are inconsistent, necessitating adoption of a uniform approach to determining standing for bid protesters. Finally, considering the costs and the benefits of the different approaches, this paper recommends that the courts adopt the "aggrieved party" standard already utilized under the APA.

## II. HISTORICAL EVOLUTION OF BID PROTEST JURISDICTION IN DISTRICT COURTS AND COURT OF FEDERAL CLAIMS

### A. Standing For Bid Protesters - the Early Years

The issue of standing in the federal courts has long been recognized as one of the most enigmatic areas of the law.[11] Government procurement cases are no exception to this rule but rather the archetype. The law of standing as developed by the Supreme Court is an extremely complex and intricate subject.[12] As one federal Appellate Judge has stated, "[m]uch that the Court has written appears to have been

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[10] While this paper focuses on the COFC and the district courts, it also analyzes the interested party issue in cases filed at the General Accounting Office (GAO). An examination of GAO's cases is conducted first since its definition of interested party plays an important role in some of the court decisions discussed later in this paper. This paper does not discuss agency cases or cases filed at the General Services Administration Board of Contract Appeals (GSBCA). Based on a lack of reference to these cases in opinions written by federal court judges on standing, it would be fair to say they have little, if any, influence on the federal courts.

[11] *See* Romualdo P. Eclavea, *Standing of Unsuccessful Bidder for Federal Procurement Contract to Seek Judicial Review of Award*, 23 A.L.R. FED. 301 (1975).

designed to supply retrospective satisfaction rather than future guidance."[13] In order to understand how standing evolved in government contract cases, it is necessary to first review the early Supreme Court cases.

The most notable early Supreme Court cases involving standing were the companion cases of *Massachusetts v. Mellon and Frothingham v. Mellon*[14] in 1923. These tax cases, in building the foundation for the "legal right" doctrine, held that the Commonwealth could not sue because its own rights were not involved, and that the individual taxpayer could not sue because the taxpayer's interests were so "comparatively minute and indeterminable."[15] Therefore, the initial threshold for establishing standing was a showing that a *legal right* of the plaintiff was violated. This threshold was further clarified in *Edward Hines*,[16] as the Court stated that the plaintiffs "must show [also] that the order alleged to be void subjects them to legal injury, actual or threatened."[17]

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(continued from previous page)

[12] *Scanwell Laboratories, Inc. v. Schaffer,* 424 F. 2d 859, 861 (D.C. Cir. 1970).

[13] *Id.*

[14] 262 U.S. 447 (1923). *Frothingham* was overruled at least in part in *Flast v. Cohen,* 392 U.S. 83 (1968). *See Scanwell*, 424 F.2d at 871.

[15] *Frothingham,* 262 U.S. at 487.

[16] *Edward Hines Yellow Pine Trustees v. United States,* 263 U.S. 143 (1923).

[17] *Id.* at 148.

The "legal right" line of cases eventually gave away to a broader criterion known as the "person aggrieved" standard necessary to establish standing. The leading case in this area was *FCC v. Sanders Brothers Radio Station.*[18] In *Sanders*, the Supreme Court granted standing to a plaintiff who was unable to demonstrate an infringement of a legally protected right. The Court relied upon its interpretation of the governing statute, stating that:[19]

> [Congress] may have been of the opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.

While the *Sanders* case is recognized as greatly expanding standing in federal courts, the Supreme Court's ruling in *Perkins v. Lukens Steel Company*[20] two months later made standing in the government procurement area an extremely difficult, if not impossible, threshold for plaintiffs to meet.

*Perkins* is recognized as the leading Supreme Court case dealing with the standing of bid protesters. This case involved seven producers of iron and steel that sought to enjoin the Secretary of Labor from applying allegedly

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[18] 309 U.S. 470 (1940).

[19] *Id. at* 477 (language quoted above is very similar to the private attorney general theory recognized thirty years later in *Scanwell* and discussed in more detail along with the *Scanwell* case later in this thesis).

[20] 310 U.S. 113 (1940).

erroneous minimum wage provisions of the Walsh-Healey Public Contracts Act[21] to the entire iron and steel industry. These iron and steel producers were prospective bidders on government contracts. The Supreme Court held that prospective bidders lack standing to contest the validity of an administrative action involving federal contracts. The Court's reasoning was that the federal procurement statute under which the plaintiffs sought relief was enacted solely for the benefit of the government and, therefore, it did not confer enforceable legal rights upon prospective bidders.

For a long time, *Perkins* was relied upon for the proposition that bid protesters were without a remedy for improper or illegal contract awards.[22] However, nothing in the *Perkins* decision precluded relief for bid protesters by the GAO or government agencies.[23]

The GAO was created in 1921 with the enactment of the Budget and Accounting Act.[24] This Act gave the head of the GAO, the Comptroller

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[21] The Walsh-Healey Act was later amended to conform to the Administrative Procedure Act. 66 Stat. 308 (1952).

[22] JOHN W. WHELAN, UNDERSTANDING FEDERAL GOVERNMENT CONTRACTS 73-74 (1993).

[23] While the focus of this section is on the history of bid protest jurisdiction in the COFC and district courts, a brief history of GAO at this point is helpful to later understand how GAO decisions affected future court opinions.

[24] Pub. L. No. 13, § 1, 42 Stat. 20 (1921).

General, authority to settle all accounts of the United States.[25] The Comptroller General broadened its settlement authority as a means to intervene in the federal procurement process to ensure that federal procurement funds were being correctly expended.[26] Even though the GAO lacked explicit statutory authority to bind executive agencies,[27] government agencies generally acquiesced to GAO's advisory decisions rather than face adverse rulings on payments or recommendations to Congress on appropriations.[28] Thus, early in its existence, in 1931, GAO reviewed its first

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[25] James McKay Weitzel, Jr., *GAO Bid Protest Procedures Under The Competition in Contracting Act: Constitutional Implications After Buckley and Chadha*, 34 Cath. U.L. Rev. 485 (1985).

[26] *Id.* at 486.

[27] The Budget and Accounting Act of 1921 provides that the GAO is "independent of the executive agencies." Pub. L. No. 13, § 302, 42 Stat. 23 (1921). The Act gave the President of the United States the authority to appoint the Comptroller General, with the advice and consent of the Senate. *Id.* § 302-303, 42 Stat. 23-24. *Bowsher v. Snar*, 478 U.S. 714, 730-32 (1986) (GAO is a legislative agency, therefore, the Comptroller General cannot issue binding decisions affecting the executive branch). *See also* Cibinic & Lasken, *The Comptroller General and Government Contracts*, 38 GEO. WASH. L. REV. 349, 393 (1969) (the GAO role "has not resulted from any clear Congressional mandate"); Tieder & Tracy, *Forums and Remedies for Disappointed Bidders on Federal Government Contracts*, 10 PUB. CONT. L.J. 92, 95 (1978) (the GAO has "no express statutory mandate" to decide bid protests); Schnitzer, *Evolving Contractors' Remedies -- The GAO*, 29 FED. B. NEWS & J. 466, 466 (1982).

[28] Weitzel, *supra* note 25, at 486.

bid protest case. [29] And for many years, until the mid-1950's, the GAO was the only "practical refuge of the bid protester."[30]

### B. Expansion of Bid Protest Jurisdiction under the Administrative Procedure Act and *Scanwell Laboratories, Inc. v. Schaffer*

In an effort to give plaintiffs judicial legal rights involving federal agencies, Congress enacted the Administrative Procedure Act (APA)[31] in 1946. In contrast to the limits of the *Perkins* ruling, the APA provided that any person "suffering legal wrong because of agency action, adversely affected or aggrieved by agency action with the meaning of a relevant statute, is entitled to judicial review thereof."[32] It was clear that Congress intended the district courts to review governmental actions brought by those "aggrieved" by such actions unless the governing statute expressly stated Congress' intent for the courts to deny review.[33]

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[29] JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 1491 (3d ed. 1998).

[30] WHELAN, *supra* note 22, at 72.

[31] 5 U.S.C. § 702.

[32] *Id.*

[33] *See* H.R. REP. NO. 79-80, at 41 (1946)("To preclude judicial review under this bill, a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review").

After Congress passed the APA, a handful of cases involving standing issues made it to the Supreme Court.[34] In essence, the Court recognized in these cases that Congress intended the APA to cover a broad spectrum of administrative actions. However, for a lengthy period, these cases did not assist bid protesters because the APA was considered to be inapplicable to government contracts.[35] Thus, bid protest jurisdiction remained essentially unchanged until 1970 when the United States Court of Appeals for the District of Columbia Circuit handed down the monumental *Scanwell*[36] case. Shortly afterwards, all federal circuits followed the *Scanwell* approach in allowing bid protesters aggrieved by agency action to bring suit against the government.[37] This decision not only expanded the bid protest jurisdiction in the district courts, it also influenced all future government procurement statutes.

In *Scanwell*, the plaintiff submitted the second lowest bid for instrument landing systems to be installed at airports and alleged that the lowest bid was

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[34] *See Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)(Congress intended the APA "to remove obstacles to judicial review of agency action under subsequently enacted statutes"); *Abbot Laboratory v. Gardner*, 387 U.S. 136, 140-41 (1967) (stating that APA's legislative history "manifests a congressional intention that it covers a broad spectrum of administrative actions"); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 7 (1968)(Court held that there was no requirement for a specific statutory grant of standing in actions by competitors to enforce statutes protecting competitive interests).

[35] WHELAN, *supra* note 22, at 72.

[36] *Scanwell Laboratories, Inc. v. Schaffer*, 424 F. 2d 859 (D.C. Cir. 1970). For a detailed analysis of the *Scanwell* case, *see* Eclavea, *supra* note 11.

[37] ABA Section of Public Contract Law Bid Protest Committee, *Courts Subcommittee Project*, at 5 (Jan. 15, 1991).

nonresponsive to the solicitation. Scanwell therefore requested the court to declare the contract awarded by the FAA to this nonresponsive bidder to be null and void. The District Court dismissed the case on the grounds that the plaintiff, as the unsuccessful bidder, lacked standing to sue. However, the Court of Appeals reversed the holding, explaining under the APA, the unsuccessful bidder had standing to seek judicial review of the award of a contract to another bidder on the grounds that the award was arbitrary, capricious, and a violation of the federal regulations controlling government contracts.

The court further articulated its reasoning for granting standing by stating what would later become known as the "private attorney general" theory of jurisdiction: [38]

> [The] essential thrust of appellant's claim on the merits is to satisfy the public interest in having agencies follow the regulations which control government contracting. The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a "private attorney general."

The court went on to state that bid protesters are the people who have the incentive to bring suit against illegal government action, rather than the general public, since

[38] *Scanwell,* 424 F. 2d at 864.

"they are precisely the plaintiffs to ensure a genuine adversary case or controversy."[39] The *Scanwell* court distinguished the case from *Perkins* on two grounds. First, the court pointed out that *Perkins* was decided during the heyday of the legal right doctrine.[40] The court stated that the "fallacy" of the *Perkins* decision has been recognized in that the opinion failed to address why those adversely affected should not be "enlisted as natural law enforcers" regardless of whether their legal rights had been violated.[41] The second, and more important reason that the *Scanwell* court was not compelled to follow *Perkins* was because the Supreme Court decided that case before Congress passed the APA.[42]

Shortly after the *Scanwell* opinion was published, the Supreme Court case, *Association of Data Processing Service Organizations, Inc. v. Camp*,[43] recognized that the law of standing in federal courts had changed under the APA. The Court observed that rather than limiting who can bring suit, the trend is toward enlarging the class of "aggrieved persons" who may protest administrative actions.

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[39] *Id.*

[40] *Id.* at 866.

[41] *Id.* at 866-67 (*quoting* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 217, 220 (1958)).

[42] *Id.* at 866.

[43] 397 U.S. 150 (1970).

In pursuit of this endeavor, the Court constructed a two-prong test under which plaintiffs would have standing. The first prong required the plaintiffs to show that the challenged action had caused them "injury in fact, economic or otherwise." The second required that the interest seeking protection be within the "zone of interests" to be protected, or regulated, by the statute in question. This decision, along with the *Scanwell* case, opened courtroom doors in district courts for disappointed bidders that had been closed for the last thirty years as a result of *Perkins*.

### C. The Contract Implied-In-Fact Theory of Bid Protest Jurisdiction

While most bid protesters were having a difficult time pursuing their cases at the district courts until *Scanwell*, others were trying their luck at the Court of Claims, the predecessor of the COFC.[44] Unlike the district courts, the origin of bid protest jurisdiction in the COFC is not the APA but the Tucker Act.[45] The Tucker Act

[44] The Court of Claims was in existence from 1855 until 1982 at which time Congress created the United States Claims Court under the Federal Courts Improvement Act (FCIA), Pub. L. No. 97-164, § 105(a), 96 Stat. 27 (1982). In 1992, Congress renamed the Claims Court to the COFC as a result of the Federal Court Administration Act of 1992 (FCAA), Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (1992). For the purposes of this thesis, the term "COFC" denotes the COFC and its predecessors, the Claims Court and the Court of Claims. It is recognized that technically the Claims Court is not a predecessor of the COFC, since it is the same court that was later renamed by Congress.

[45] 28 U.S.C. § 1491(a)(1). The Tucker Act was originally passed in 1855 and enacted in its present form in 1887. As a result of the Tucker Act, the [COFC] became the major court resolving government contract disputes. *See* RALPH C. NASH ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK 523-24 (2nd ed. 1998).

waives sovereign immunity for all claims "founded either upon the Constitution, or any Act of Congress or any regulation or an executive department, or upon any express or implied contract with the United States."[46] This jurisdiction as it pertains to bid protest jurisdiction in the COFC is, therefore, often referred to as the Implied Contract Doctrine or the Contract Implied-In-Fact Theory.

It is important to note that at the time, the court's jurisdiction under the Tucker Act lacked general equitable powers and could not grant injunctive relief or declaratory judgments.[47] Therefore, the Court of Claims' remedy for the government's breach of an implied contract was limited to awarding the protester its bid and proposal costs.

Despite this insubstantial remedy, some bid protesters still sought relief at the COFC. Using the contract implied-in-fact theory of jurisdiction, in 1956, the first successful bid protester convinced the court that, despite the Supreme Court ruling in *Perkins*[48], submission of an offer implicitly obligates the government to evaluate the bid in good faith.[49]

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[46] 28 U.S.C. § 1491(a)(1).

[47] WHELAN, *supra* note 22, at 73.

[48] *Perkins v. Lukens Steel Company*, 310 U.S. 113 (1940)(procurement statutes are enacted for the benefit of the government and not for disappointed bidders).

[49] *Heyer Products Co. v. United States*, 140 F. Supp. 409 (Ct. Cl. 1956), *amended by* 177 F. Supp. 251 (1959)(dismissing the case on the merits because the plaintiff's product did not comply with the government specifications).

The court articulated this holding more clearly years later in *Keco Industries*.[50] In this case, the court ruled that an unsuccessful bidder is entitled to relief by showing: (1) the government breached the implied-in-fact contract to consider all bids fairly and honestly; and (2) the government's conduct was arbitrary and capricious.[51] Disappointed bidders were the only parties who had standing to bring a bid protest in this context since they were the only ones who could be considered to have this implied contractual relationship with the government.[52]

### D. Federal Courts Improvement Act Muddied the Waters for Future Bid Protesters

In 1982, Congress enacted the Federal Courts Improvement Act (FCIA) providing explicit pre-award bid protest authority to the newly created United States Claims Court (later renamed the Court of Federal Claims).[53] On the one hand, the FCIA made lawsuits more meaningful for bid protesters by granting the court the

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[50] *Keco Industries, Inc. v. United States,* 492 F.2d 1200 (Ct. Cl. 1974).

[51] In *Keco*, 492 F.2d at 1203-04, the Court of Claims provided four factors to determine whether the government has breached its duty. Those factors are: (1) subjective bad faith on the part of the government; (2) absence of a reasonable basis for the administrative decision; (3) the amount of discretion afforded to the procurement officials by applicable statutes and regulation; and (4) proven violations of pertinent statutes or regulations.

[52] *See Motorola, Inc. v. United States*, 988 F.2d 113, 114 (Fed. Cir. 1993); *Control Data Systems, Inc. v. United States,* 32 Fed Cl. 520, 524 (1994). *See also American Federation of Government Employees, AFL-CIO, et al v. United States*, 46 Fed. Cl. 586 (2000).

[53] FCIA, § 133, 96 Stat. 25, 39-40 (1982). For a discussion on the history of the COFC *see supra* note 42.

power to award injunctive relief. Yet, the poorly phrased new statute created fourteen years of needless confusion in the federal courts. The language in the FCIA provided: [54]

> "To afford complete relief on any contract claim brought before the contract is awarded, the [COFC] shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief."

Two phrases in this one sentence were perplexing for the courts. The most troublesome was the phrase "exclusive jurisdiction."

A plain reading of "exclusive jurisdiction" suggests that Congress had taken away from the district courts part of what *Scanwell* had given them by granting the COFC sole jurisdiction over pre-award bid protests. Under this interpretation, the district courts were left with only post-award jurisdiction. However, this jurisdictional "taking" is contrary to FCIA's legislative history which provided that the "Scanwell doctrine as enunciated by the D.C. Circuit Court of Appeals in 1970 is left intact."[55]

This conflict between a plain reading interpretation of the statutory language and its legislative history resulted in a split of opinion among the federal Appellate

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[54] FCIA, § 133 at 39-40.

[55] S. REP. NO. 97-275, at 23 (1982), reprinted in 1982 U.S.C.C.A.N. 11, 33 ("By conferring jurisdiction upon the Claims Court to award injunctive relief in the preaward stage of the procurement process, the Committee does not intend to alter the current state of the substantive law in this area. Specifically, the Scanwell doctrine as enunciated by the D.C. Circuit Court of Appeals in 1970 is left intact").

Courts. Most courts interpreted the phrase "exclusive jurisdiction" to mean exclusive of the district courts. However, other courts understood it to mean exclusive of the board of contract appeals.[56] This latter interpretation was consistent with the legislative history as it kept district courts in the business of handling both pre-award and post-award bid protests consistent with the Scanwell doctrine.

Unfortunately for the government contractors wanting to challenge agency actions at the district courts *before contract award*, this legislative history was more often ignored than not. The bottom-line was that from 1982 until 1996, most Appellate Courts held that bid protestors seeking a judicial forum had to go to the COFC for pre-award challenges to government procurements and to the district courts for post-award challenges.[57]

The district courts were not alone in their confusion over the language in the FCIA. The statute also created confusion in the COFC. The phrase of the FCIA

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[56] *See generally* ABA Section of Public Contract Law Bid Protest Committee, *Comments Regarding U. S. General Accounting Office Study of Concurrent Protest Jurisdiction* 1999) at 8 (visited May 27, 2000) <http://www.abanet.org/contract/federal/bidpro/scanwell.pdf> [*hereinafter* ABA Scanwell Report].

[57] *See J.P. Francis & Assoc. v. United States*, 902 F. 2d 740 (9th Cir. 1990)(court held that FCIA divests the district courts of jurisdiction over pre-award government contract claims); *Commercial Energies, Inc. v. Cheney*, 737 F. Supp. 78 (D. Colo. 1990)(ruling that [COFC] possessed exclusive jurisdiction to hear pre-award government contract disputes). *But see, Cubic Corp. v. Cheney*, 912 F.2d 1501 (D.C. Cir. 1990)(court declined to decide the issue of whether FCIA grants the COFC exclusive jurisdiction over pre-award protests); *Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052, 1057-58 (1st Cir. 1987).

statute that created confusion at the COFC was "contract claim brought before the contract is awarded." Recall the earlier discussion about COFC's "implied-in-fact contract" jurisdiction to give bidders and their bids fair and honest consideration. This jurisdiction granted relief to bidders regardless of whether the claim was brought before or after award.[58] Under the FCIA, the court's jurisdiction was only pre-award. Congress' rationale was that judicial interference during the administration of awarded contracts would hinder the government procurement process.[59]

The wisdom of this rationale is suspect for several reasons. The COFC, along with the district courts, entertained post-award jurisdiction before FCIA was enacted without hindering the procurement process. Furthermore, if Congress truly thought the procurement system was substantially hindered by post-award cases, the FCIA would have also terminated post-award jurisdiction in the district courts. After all, post-award cases are not less of a judicial interference at the district courts than at the COFC. Regardless of the reasons, the enactment of the FCIA expanded the remedy for pre-award bid protesters at the expense of excluding post-award bid protesters at the COFC.

This ambiguous FCIA phrase also created confusion as to whether the pre-award protester had to rush to the courthouse and actually file the complaint before the contract was awarded in order to invoke the court's equitable powers. In the

[58] WHELAN, *supra* note 22, at 75.

*Grimberg* case, the Federal Circuit held that the COFC lacks jurisdiction over a complaint requesting equitable relief, if it were *filed* after the award of the contract.[60] As recognized by one of the judges concurring in the *Grimberg* opinion, the difficulty with the statute as construed by the Federal Circuit is that it "achieves an insignificant and absurd result."[61] For instance, the plaintiff who wants to litigate his bid protest in the COFC must file the suit before he knows whether he has anything to protest. The situation could arise where he ends up having sued to enjoin an award to himself. Congress could not have intended such a tortured result.[62]

Confusion over the phrases "exclusive jurisdiction" and "contract claim brought before the contract is awarded" certainly created problems. However, most problematic for bid protesters was the COFC's narrow interpretation of FCIA's jurisdiction. Although this statute purported to authorize the COFC the power to "afford complete relief *on any contract claim* brought before the contract is awarded,"[63] the COFC held that 28 U.S.C. § 1491(a)(3) expanded its remedial powers but not its

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[59] *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1371 (Fed. Cir. 1983).

[60] *Id.* at 1376.

[61] *Id.* at 1378.

[62] John S. Pachter, *The Need for a Comprehensive Judicial Remedy for Bid* Protesters, 16 PUB. CONT. L. J. 47, 55 (1986).

[63] *See* FCIA, § 133, 96 Stat. at 40 (emphasis added).

bid protest jurisdiction.[64] Therefore, as a result of the COFC's narrow interpretation of FCIA, its bid protest jurisdiction remained the same as it was under the bidder's implied contract theory.[65] At best, congressional intent was misunderstood by the judges; at worse, it was just plain ignored.

The more cases heard by the COFC on this matter, the worse it became for bid protesters. Approximately a year after FCIA was enacted, the COFC ruled that its "jurisdiction over the implied contract of fair dealing in disappointed bidder cases embraced neither claims challenging terms, conditions, or requirements of solicitations, nor policies and activities which preceded and resulted in the solicitations."[66] As a result of COFC's restrictive interpretation of its bid protest jurisdiction under the FCIA, many bid protesters were wrongly denied the opportunity of having their cases heard in the COFC.

### E. ADRA Expands Bid Protest Jurisdiction but Creates New Problems

After fourteen years of the jurisdictional quagmire caused by the FCIA, Congress finally made another attempt to clear the muddy waters for bid protesters. While Congress' passage of the Administrative Disputes Resolution Act (ADRA)[67] in

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[64] *Grimberg*, 702 F.2d at 1376.

[65] *See* ABA Scanwell Report, *supra* note 56, at 8.

[66] *Eagle Construction Co. v. United States*, 4 Cl. Ct. 470, 476 (1984).

[67] Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a), 110 Stat. 3869, 3874 (1996)(codified at 28 U.S.C. § 1491 (b)(1)).

1996 should not be characterized as a "strike-out", it was not a "home-run" either. The ADRA solves some of the old problems under the FCIA, but also creates new problems for bid protesters.

The relevant portion of this revised statute, which confers post-award bid protest jurisdiction on the Court of Federal Claims states:[68]

> (b)(1) Both the Unite[d] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

The good news is that the ADRA extended concurrent and identical bid protest jurisdiction to both fora so that they both adjudicate pre-award and post-award challenges. Therefore, bid protesters were no longer subjected to the problems caused by the poorly phrased FCIA. The bad news, as usual, takes longer to explain.

The first quandary is that the Tucker Act, as amended by the ADRA, does not define the term "interested party." As a result, the district courts and the COFC have conflicting definitions of the term "interested party". Because of this discord,

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[68] *Id.*

the same plaintiffs that would be granted standing at the district courts could be denied "interested party" status at COFC.

Moreover, as previously mentioned and explained in greater detail later in this paper, the judges at COFC do not agree among themselves as to what definition should be used. Thus, a plaintiff's ability to seek judicial review of a governmental action relating to a government contract at the COFC may depend less on the facts and circumstances surrounding his or her case than on the fortuitous assignment of the presiding judge.

Although the focus of this thesis concerns who qualifies as an interested party under the ADRA, the second quandary created by this statute is also of major importance. This second quandary is the sunset provision the ADRA contains pertaining to the district courts.[69] Bid protest jurisdiction in district courts *under the ADRA* expires on January 1, 2001, unless Congress takes affirmative action to extend the jurisdiction.[70] The words "*under the ADRA*" are italicized because the effect of this sunset provision is uncertain. There are valid arguments that the ADRA's sunset

[69] *Id.* at § 12(d), 110 Stat. at 1874 (codified at 28 U.S.C. § 1491)("Sunset. --The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress.").

[70] Michael F. Mason, *Bid Protests And The U.S. District Courts -- Why Congress Should Not Allow The Sun To Set On This Effective Relationship*, 26 PUB. CONT. L.J. 567 (1997).

provision will not extinguish the district court's pre-existing *Scanwell* jurisdiction.[71] While these arguments make perfect legal sense, few attorneys, paid by clients' hard-earned cash, however, would be willing to test these theories in the district courts after the sunset.

The bottom-line: despite some excellent, published articles[72] calling upon Congress to take whatever action necessary to prevent bid protest jurisdiction in the district courts from disappearing, it now appears that Congress will not act. Therefore, bid protesters will lose the opportunity to take their cases to the district courts in the near future. Therefore, it is even more important for the judges at the COFC to address the issue of who is an "interested party" since the COFC will be the only forum for bid protesters to seek judicial review of their complaints.

## III. REVIEW OF CASES INTERPRETING INTERESTED PARTY STATUS IN THE POST-ADRA ERA

The ADRA provided that a protest may be pursued by "an interested party objecting to a solicitation ... or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or proposed procurement."[73]

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[71] Steven L. Schooner, *Watching The Sunset: Anticipating GAO's Study of Concurrent Bid Protest Jurisdiction in the COFC and The District Courts,* 42 THE GOV'T CONTRACTOR 12 (2000).

[72] *Id. See also* Mason, *supra* note 70.

[73] 28 U.S.C. § 1491(b)(1).

District courts' bid protest jurisdiction has not actually changed as a result of the ADRA. Judges at the district court still employ APA law under *Scanwell* to determine whether a bid protester has standing rather than looking to the ADRA.

However, the ADRA has significantly affected standing for bid protesters in the COFC. Because the COFC's pre-ADRA bid protest jurisdiction was founded on the theory of an implied-in-fact contract of fair and honest consideration, the COFC had previously ruled that only an actual offeror or bidder had standing to file a bid protest.[74] While it was clear that under the ADRA, standing was not limited to just actual offerors or bidders, it was not clear just who qualified as an interested party at the COFC. Some of the judges at the COFC adopted the restrictive GAO definition of interested party while others have employed a more favorable standing threshold for bid protesters.

### A. General Accounting Office

While Congress failed to define "interested party" in § 1491(b), Congress previously instructed GAO to employ in its bid-protest jurisdiction the definition of this term as stated in the Competition in Contracting Act (CICA)[75] of 1984. This CICA definition also referred to as the GAO definition, of "interested party" is "an

[74] Rand L. Allen, et al, *The ADRA and Post-Award Bid Protests at the Court of Federal Claims: New Options to Weigh*, 71 BNA FED. CONTR. REP., NO.14 (April 5, 1999).

[75] 31 U.S.C. § 3551(2) (1994).

actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."[76]

Congress borrowed this definition from the repealed General Services Administration Board of Contract Appeals (GSBCA) protest authority statute.[77] This definition is Congress' action to limit the authority of the GAO to entertain a bid protest.[78] By enacting a statute that narrowly defined the class of protesters, Congress did not intend for GAO to review protests of "innumerable disappointed bidders who have little or no chance of receiving the contract."[79]

Under the statute, *actual bidders* or *offerors*, are of course, those who actually submit bids or proposals to the federal government. If an actual bid or offer was not submitted, then the party must be a *prospective bidder* or *offeror* in order to be considered

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[76] *Id.* The FAR does not limit who may file a protest at the agency level. Therefore, agencies may consider protests from any person that raises legitimate concerns about a procurement. CIBINIC & NASH, *supra* note 29, at 1485. However, FAR 33.102(e) encourages an "interested party" wishing to protest to first seek resolution within the agency. The definition of "interested party" as it relates to FAR 33.102(e) is defined by FAR 33.101. This definition is the same as the GAO definition.

[77] 40 U.S.C. § 759(f)(9)(B)(1994)(repealed 1996). A similar definition of "interested party" appeared in the Brooks Act to define what parties had standing to bring bid protest actions in certain types of Automatic Data Processing (ADP) procurements. However, the Brooks Act was repealed by Pub. L. No. 104-106, removing GSBCA's jurisdiction over computer procurement protests.

[78] *United States v. International Business Machs. Corp.*, 892 F.2d 1006 (Fed. Cir. 1989).

[79] *Id.* at 1011.

an "interested party" by the Comptroller General. Thus, the difficulty for GAO is determining just who qualifies as a *prospective bidder* or *offeror* under the statute.[80]

The term "*prospective bidder* or *offeror*" has been defined as a potential competitor for the type of work the government is procuring.[81] However, opinions determining whether a party is a "prospective bidder" are not consistent. For instance, in the *Tumpane*[82] case, Tumpane was declared to be an interested party because GAO believed he would have placed a bid if the specifications had not been defective. The Comptroller General stated that under CICA, Tumpane's interest as a "potential competitor if the protest is successful is sufficient for it to be considered an interested party."[83]

However, the Federal Circuit reached a different result in *Federal Data Corp. v United States.*[84] The protester in this case withdrew from the bidding process and filed a protest alleging government misconduct. The protester intended to compete in a later solicitation if the board had found the government conduct to be unlawful. The court affirmed the board's ruling that Federal Data was not an interested party.

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[80] *See* CIBINIC & NASH, *supra* note 29, at 1496 (emphasis.added).

[81] *Tumpane Servs. Corp.*, Comp. Gen. Dec. B-220465, 86-1 CPD ¶ 95.

[82] *Id.*

[83] *Id.* at 96.

[84] 911 F.2d 699 (Fed. Cir. 1990).

Based upon the *Tumpane*[85] line of cases,[86] Federal Data would have been better off if it had *not* entered the bidding process, alleging that it would have submitted a bid but for the agency's misconduct. Under the theory of "potential competitor if the protest is successful", Federal Data should have been considered an interested party.

According to GAO opinions, determining whether a party is sufficiently interested under CICA involves consideration of a variety of factors, including the nature of the issues in relation to the procurement.[87] However, a review of GAO cases interpreting "interested party" status indicates that GAO is mostly, if not exclusively, concerned with only one factor: whether the protester would be eligible for award if the protest were sustained.

For instance, in *CW Government Travel*, Carlson Wagonlit Travel (Carlson) and American Express Travel Related Services Company (Amex) protested the terms of the Navy's request for proposals (RFP).[88] The RFP contemplated a "no-cost"

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[85] *Tumpane Servs. Corp.*, 86-1 CPD ¶ 95.

[86] *See Northern Virginia Serv. Corp.*, Comp. Gen. Dec. B-224450; B-224450.2, 86-2 CPD ¶ 439 (protester who failed to submit a bid because of a wage determination problem had sufficient interest to be considered an interested party); *Newport News Shipbuilding and Dry Dock Co.*, Comp. Gen. Dec. B-221888, 86-2 CPD ¶ 23 (protester, refusing to submit a bid due to improprieties in the solicitation, is an interested party).

[87] *CW Government Travel, Inc d/b/a/ Carlson Wagonlit Travel*, B-283408, 99-2 CPD ¶ 89 *quoting Free State Reporting, Inc.*, B-225531, 87-1 CPD ¶ 54; *Georgetown University--Recon.*, B-249365.3, 93-1 CPD ¶ 434 *quoting Jack Young Assocs. Inc.*, B-243633, 91-1 CPD ¶ 585.

[88] *CW Government Travel*, 99-2 CPD ¶ 89.

contract for the Navy. Compensation for the contractor's performance would be the commissions paid by the airlines. The RFP also provided for offerors to include in their proposal a portion of the airline commissions to be shared with the Navy.

During their protest, Carlson and Amex submitted declarations stating that they would not respond to the solicitation unless the solicitation's commission-based pricing provisions were removed. GAO denied their protests challenging those pricing provisions on the merits. Carlson and Amex had also challenged other terms in the solicitation. The Comptroller General refused to consider these other challenges declaring the protesters not to be interested parties because of their declaration that they would not respond to the solicitation unless the pricing provision were removed. Thus, GAO considered Carlson and Amex not to be "actual or prospective bidders" since they made it clear that they would not compete in the procurement if the government were allowed to keep the commission-based pricing provision in the solicitation.

In most cases, however, a finding of non-interested party status means the protestor will not be heard on the merits concerning *any* of his claims. Such was the case for the protester who was denied the opportunity to challenge the Government's comparative ranking of proposals and failure to conduct meaningful discussions in accordance with procurement regulations.[89] This protester was declared not to be an

[89] *Georgetown University--*Recon., 93-1 CPD ¶ 434.

interested party because it had submitted an unacceptable initial proposal and then a late best and final offer.

The restrictive nature of the GAO's definition is further illustrated by the case of *International Training*.[90] The solicitation was for defensive driver training services which were to be provided at a facility located within eighty road miles of the United States Capitol building. The facility had to include hills, foliage, and other natural terrain to allow for ambush and surprise attack training. International Training filed a protest before the date set for receipt of proposals contending that only one company owned a facility that met the solicitation requirements. The protester complained that the restrictive solicitation violated CICA. In this case, the government had clearly violated procurement regulations for its failure to justify why this solicitation for defensive driver training was not conducted as a full and open competition.[91]

The GAO dismissed this protest stating that International Training was not an interested party since it conceded that its facility did not meet the location and topography requirements of the solicitation. GAO did not address why International Training was not considered an interested party as a "potential competitor if the

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[90] *International Training, Incorp.*, Comp. Gen. Dec. B-272699, 96-2 CPD ¶ 132.

[91] Any time the government wishes to proceed with a procurement that is other than full and open competition, it must receive approval of its justification as to why an exception is necessary. 41 U.S.C. § 253(f).

protest is successful".[92] This opinion is, therefore, another example of inconsistent application of the *Turnpane*[93] line of cases.[94]

The jurisdictional hurdle for bid protesters at GAO is summed up in the following sentence: the protester must be next in line for the award to be considered an interested party.[95] While there have been exceptions to this rule,[96] for the most part, GAO has been consistent in restricting standing only to those bidders who have a direct economic stake in the outcome.

Moreover, GAO's opinions often suggest that the protester should have challenged the terms of the solicitation rather than a violation of procurement

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[92] Although not stated by GAO, GAO may have assumed that the agency could have received approval of its justification for the solicitation and therefore International Training would have been ineligible even if the procurement had be recompeted. So while some readers may think this is an inequitable characterization of *International Training*, the case is still illustrative of the important point that even a proven violation of CICA is not sufficient to grant a protester standing at GAO.

[93] *Turnpane Servs. Corp.*, Comp. Gen. Dec. B-220465, 86-1 CPD ¶ 95.

[94] For a list of the *Turnpane* line of cases, *see supra* note 86.

[95] *Kongdan Kumnan Restaurant/Good Food Service*, B-276846.2, 98-1 CPD ¶ 57 (offeror third in line for award is not an interested party); *Advanced Designs* Corp., B-275928, 98-1 CPD ¶ 100 (protester was not an interested party after submitting a technically unacceptable proposal); *J.T. Construction Co.*, -- Recon., B-242845.4, 92-1 CPD ¶ 245 (third lowest offeror is not an interested party since the protester would not be next in line for award if the protest were upheld).

[96] *See International Assoc. of Fire Fighters*, Comp. Gen. Dec. B-224324; B-224324.2, 87-1 CPD ¶ 619 (not next in line for award but still an interested party because it would compete on the future solicitation if the protest is successful).

regulations.[97] Thus GAO's application of the CICA definition of interested party does not encourage or even allow a protester to keep the government honest. While this way of thinking may be logical under the restrictive CICA definition of interested party, it is precisely the reason that neither the district courts nor the COFC should apply this definition to bid protests cases.

### B. United States District Courts

Despite the uproar that § 1491 has caused in the COFC, few district court cases cite to this statute in their opinions. Despite the fact the ADRA was enacted almost four years ago, not a single *Scanwell* case has cited the statute as a basis for its bid protest jurisdiction.

The fact that the term "interested party" is not defined by the ADRA is, therefore, insignificant to the district court judges. Until very recently, to establish standing in the district courts *after* the ADRA, the judges looked to the Supreme Court case of *Lujan v. National Wildlife Federation.*[98] Under the *Lujan* case, the bid protester had to show that: (1) he suffered an "injury in fact" and (2) the injury falls

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[97] *International Training, Incorp.*, Comp. Gen. Dec. B-272699, 96-2 CPD ¶ 132, 134 ("Since the protester could not be eligible for contract award were its protest sustained, and *has not otherwise protested the terms of the [request for proposal]* which make it ineligible for award, International Training is not an interested party for the purposes of this protest.")(emphasis added).

[98] 497 U.S. 871 (1990).

within the "zone of interests" sought to be protected under the statute.[99] This is the same standing requirement that pre-ADRA bid protesters had to establish.[100]

However, in the recent Court of Appeals for the District of Columbia opinion, *Advanced Management Technology, Inc.* (*"AMTI"*),[101] the judge's interpretation of a recent Supreme Court case, *Friends of the Earth, Inc.*,[102] suggests that standing requires more than the two-part *Lujan* test.

In this case, AMTI responded to Federal Aviation Administration's (FAA) January 1998 Request for Offers and was awarded the contract. However, two disappointed bidders, alleging among other things that AMTI was guilty of a "bait and switch" of key personnel, filed protests. FAA referred the protests to its Dispute Resolution Office. Eventually, FAA adopted the findings of that office stating that AMTI had made "misrepresentations" in its bid. As a result of these findings, the FAA ordered the bid process reopened. However, AMTI was allowed to recompete

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[99] *AT&T Corp. v. U.S. Postal Service*, 21 F. Supp. 2d 811 (N.D. Ill. 1997); *Information Systems & Network Corp., v. United States*, 970 F. Supp. 1 (D.C. Cir. 1997). Both cases quoted the two-part standing test from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

[100] *Munitions Carriers Conference, Inc., v. United States*, 932 F. Supp. 334 (D.C. Cir. 1996).

[101] *Advanced Management Technology, Inc. v. FAA*, 211 F.3d 633 (D.C. Cir. 2000).

[102] *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S.__,** 120 S.Ct. 693 (2000). **The page number has not yet been assigned as it is still in opinion format.

for the new contract as the FAA found no "actual intent to defraud the government."[103]

Even though AMTI was awarded the new contract, it filed a "protest" seeking a reversal of the FAA's findings or a new hearing with different procedures. The FAA successfully challenged AMTI's standing, arguing that since AMTI is performing under a more lucrative contract, it has not suffered an "injury in fact." Quoting from *Friends of the Earth, Inc.*, the court held that AMTI:[104]

> "must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

The court dismissed AMTI's petition stating that "[c]haritably, the injury is 'speculative' – the ultimate label for injuries too implausible to support standing."[105] Since AMTI was not able to cross the first hurdle "injury in fact," the court had no need to elaborate on the rest of the standing requirements. Thus we can only speculate as to how the court will apply these requirements, if at all, in the future. However, speculation on this matter is premature as it is too early to tell whether the *Friends of the Earth* standing analysis will change the traditional standing analysis under

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[103] *Advanced Management Technology,* 211 F.3d at 635, *citing* the administrative record.

[104] *Id.* at 636.

[105] *Id.* at 638, *citing Alamo v. Clay,* 137 F.3d 1366, 1370 (D.C. Cir. 1998).

*Scanwell* and the APA.[106] Nevertheless, it will be worthwhile to keep track of whether future cases adopt this more in-depth standing analysis.

Importantly, a review of both of these cases published in year 2000 discloses a startling fact: neither the Supreme Court nor the D.C. Circuit even mentions the ADRA much less used the ADRA phrase "interested party" in determining standing. While some district courts have written the phrase "interested party" in their opinions, it was more often used to break up the monotony of repeated use of the words plaintiff or protester. As illustrated in *ATMI*,[107] district courts do not use this term to decide which bid protest actions will be heard in their courts.[108] District courts for the most part use the normal APA rules on standing. While minds can differ on the reason, a review of the district courts cases indicate that § 1491 is largely ignored by the district court judges.

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[106] "[A] disappointed bidder ... has standing under 5 U.S.C. § 702 to act as a 'private attorney general' in order to prevent the granting of a contract through 'arbitrary or capricious' action amounting to 'illegal [agency] activity'". *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989) *quoting Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970).

[107] *Advanced Management Technology*, 211 F.3d 633.

[108] *See Information Systems & Network Corp. v. United States*, 970 F. Supp. 1 (D.C. Cir. 1997), where the judge analyzed standing of a subcontractor under APA law despite plaintiff's assertions that ADRA expanded district court jurisdiction. Court held that the amendments of ADRA did not apply because plaintiff's wrongful termination of contract claim is not one of a "frustrated bidder."

In the recent case of *Icelandic Steamship*[109], the judge ignores the ADRA completely. This case involved a somewhat complex but interesting set of facts. Briefly, the United States entered into a sealift treaty with the Government of Iceland (GOI) which provided that only U.S. and Icelandic shipping companies may bid on military contracts to re-supply the U.S. forces in Iceland. The overall low bidder between the two countries would be awarded sixty-five percent of the shipping volume. The low bidder from the *other* country would be awarded the remaining thirty-five percent. Historically, the Icelandic company, Eimskip, had been the overall low bidder and an American company, Van Omeran, was awarded the remaining thirty-five percent. [110] However, in 1998 two newly formed shipping companies placed the lowest bids. The lowest overall bidder was an Icelandic company called TransAtlantic Lines- Iceland ("TLI"), and an American company, TransAtlantic Lines, L.L.C. ("TLL") received the remaining thirty-five percent. TLI and TLL have substantially similar ownership and are principally managed by Gudmundur Kjaernested, who is a citizen of Iceland and United States resident. Mr. Kjaernested and Brandon C. Rose, a United States citizen, owned both companies.

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[109] *Iceland S.S. Co. v. Dept of the Army*, 201 F.3d 451 (D.C. Cir. 2000).

[110] In practice, the lowest bidder was always an Icelandic company, who had much lower costs than their American competitors; thus the treaty guaranteed that Iceland would receive sixty-five percent of the shipping volume and the United States thirty-five percent. *Id.* at 454.

The losing bidders, Eimskip and Van Ommeren, filed protests alleging basically that the "common ownership of TLI and TLL made the bidding process something other than a competition" and furthermore, that TLI was not a true Icelandic shipping company as required by the treaty.[111] They also challenged the Contracting Officer's decision that both of these companies were "responsible bidders."[112] While the interpretation of an international treaty is implicated in the case, the court stated that the action is "essentially a disappointed bidder case."[113]

In addressing the standing issue, the judge simply stated:[114]

> Disappointed bidders may challenge a government contract award under the Administrative Procedure Act ("APA"), which empowers courts to set aside any agency action that is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1994); *see Scanwell Lab., Inc. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970).

It would be expected that a judge for the United States Court of Appeals for the District of Columbia Circuit, in such a high profile case, would be especially

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[111] *Id.* at 457.

[112] *Id.*

[113] *Id.* at 453. The court reversed the lower district court's decision in favor of the disappointed bidders, finding that a competition did take place and that the decision of the Contracting Officer was rational.

[114] *Id.* at 453.

concerned about applying the most applicable law on standing.[115] Because of the high profile nature of the case, the judge had to expect the opinion would be circulated among interested congressional members. It certainly is not out of the realm of possibility that a congressional member would recognize that this opinion completely ignores the ADRA. This recognition could, at least in theory, trigger a congressional inquiry into whether other district court judges are also ignoring the ADRA. Obviously, this has not happened, but the fact that an appellant court judge, in a high profile case, so blatantly ignores the ADRA, is illustrative of the point that district court judges are not concerned about the implications of the ADRA.

Is it possible that the district courts are not aware of the ADRA? It is difficult to assume that the intelligent judges and clerks at the district courts are just plain ignorant of this statute. More than likely, something else is going on. District courts have little incentive to recognize a statute that purports to "give" them something that they already have under the Scanwell doctrine: jurisdiction over bid protests. After all, if the district courts started citing the ADRA as their basis for bid protest

[115] Several members of Congress, as well as the State Department, were heavily involved in this case as high ranking officials of the Icelandic government tenaciously complained about the Contracting Officer's decision to award to TLI and TLL.

jurisdiction rather than *Scarwell* and the APA, then they would be out of the bid protest business on January 1, 2001.[116]

However, the possibility that district court judges are not aware of the ADRA may not be as remote as it first seems. District court judges' familiarity with the ADRA definitely is questionable in view of *Consolidated Edison.*[117] Two years after the ADRA was enacted, a district court judge, in this case involving several breaches of contract among other allegations, cited to the repealed statute as it relates to the COFC. The court had to decide whether or not it had jurisdiction to grant a requested stay or dismiss the action filed in its court because related proceedings had already been filed at the COFC. The district court went into a brief discussion of the COFC's jurisdiction stating:[118]

> 28 U.S.C. § 1491, commonly known as the Tucker Act, outlines the jurisdiction of the Court of Federal Claims.... Subsection (b) explicitly delegates declaratory and injunctive authority to the CFC, but only in cases where a disgruntled bidder is objecting to a bidding process - i.e., before a contract with the government has been awarded.

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[116] Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a), 110 Stat. 1874 (1996)(codified at 28 U.S.C. § 1491). To read the specific language of the sunset provision, *see supra* note 69.

[117] *Consolidated Edison Co. of New York, et al. v. United States*, 30 F. Supp. 2d 385 (S.D.N.Y. 1998).

[118] *Id.* at 388.

While this case was obviously not a *Scanwell* case,[119] it is reasonable to expect the judge to be aware of the ADRA as this same judge will also review bid protests.

Another case that brings the district court judges' familiarity with the ADRA into question is *Information Systems & Network Corporation* ("Info Systems").[120] Info Systems entered into a contract, with four renewable options, with the National Institute of Environmental Health Sciences ("NIEHS") in 1993 as a prime contractor.[121] The third option was not renewed by the NIEHS. The goods and services that Info Systems would have provided the government under the third option was incorporated into a new contract and awarded to OAO Corporation ("OAO") and its subcontractor, Technology Planning & Management Corporation ("TPMC").

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[119] The plaintiffs in *Consolidated Edison*, 30 F. Supp. 2d 385 were twenty-two domestic, nuclear utility companies that had purchased uranium enrichment services from the Department of Energy. Once the market fell due to increased competition from foreign suppliers, the government wanted out of the business. Congress then passed the Energy Policy Act requiring the plaintiffs to pay a special assessment to support a fund for decontamination and decommission. The plaintiffs, having already paid $560 million in special assessments, sued in the district court contesting the constitutionality of the special assessments and in the COFC to recover past payments. Although the court recognized that it had the power to decline to exercise jurisdiction over the six counts filed at the COFC, it elected to assume jurisdiction.

[120] *Information Systems & Network Corp. v. United States*, 970 F. Supp. 1 (D.C. Cir. 1997) (hereinafter "*Info Systems*").

[121] The price of the contract at time of award, including all four options, was $19 million. *Id.* at 2.

This new contract was in accordance with NIEHS' special program, the Chief Information Officer's Solutions and Partners ("CIOSP").[122] This program allows for the issuance of task orders by the NIEHS to its 20 prime contractors who were "teamed" with small companies. These smaller companies, acting as subcontractors, would fulfill these task orders, should they be awarded to the prime contractor. Under this program,[123] Unisys was a prime contractor and teamed with Info Systems thus making Info Systems a subcontractor. OAO, the intervenor in this case, is also a CIOSP prime contractor and is teamed with TMPC (the subcontractor).

Info Systems alleges that Unisys was told by NIEHS that it would not receive an award if it used Info Systems as a subcontractor thus blacklisting Info Systems.[124] Subsequently, Unisys did not file a bid on this new contract. Since Unisys could only use Info Systems and Info Systems could only use Unisys under the CIOSP program, Info Systems was prevented from competing for the work it had formerly done for the government.

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[122] CIOSP employs multi-year ID/IQ contracts utilizing cost-plus fixed fee, cost-plus award fee, time and materials, and firm-fixed-price task orders to provide information technology operation support and other services to the NIEHS.

[123] CIOSP was authorized by the Federal Acquisition Streamlining Act of 1994 and codified at 41 U.S.C.A. § 253(h).

[124] Info Systems alleged that the Contracting Officer's Technical Representative (COTR) wanted to give the work to his "buddy" at TMPC, OAO's teaming partner. There was no suggestion in the court's opinion that Info Systems' past performance was an issue. *Info Systems*, 970 F. Supp. at 4.

For present purposes, the relevant issue of this case involved whether Info Systems had standing to raise several CICA violations.[125] Deviating from the normal APA analysis on standing, the judge intertwined the GAO's definition of "interested party" in an APA analysis to determine standing despite Info Systems' assertions that the district court should use the ADRA. Info Systems had argued that its case was not a wrongful termination claim under the Contract Disputes Act (CDA), but "rather an issue of whether the government followed its own regulations for the continuation or termination of a contract."[126] Dismissing this argument, the court held that the amendments of ADRA did not apply because Info Systems' wrongful termination of contract claim is not one of a "frustrated bidder."[127]

In applying this unusual GAO and APA analysis, the judge found that Info Systems, as a subcontractor, was not an "actual or prospective bidder or offeror" and, therefore, did not fall within CICA's zone of interests.[128] In making this determination, the court looked strictly to CICA's "interested party" definition used by the GAO. The *Info Systems* court should have looked to CICA's *substantive*

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[125] The complaint allegations involved a Bivens action, violations of the APA and federal statutes surrounding termination of Info System's contract as a result of the government's failure to exercise an option renewal. It also involved violations of the APA and federal statutes in connection with the failure of Info Systems to be included in the competition for the new contract.

[126] *Info Systems*, 970 F. Supp. at 4 (CDA claims must be filed at the COFC).

[127] *Id.* at 6.

[128] *Id.* at 7-9.

provisions and purposes, as other courts have done[129], not its *procedural* ones, especially since these procedural provisions apply to a completely different forum.[130]

It is unusual for district courts to apply this "GAO standing analysis" to bid protesters. District courts typically do not look to the GAO for guidance concerning who is a proper party but rather apply the normal standing principles that are applied in all APA cases when deciding bid protests actions.[131]

As *Info Systems* illustrates, the use of the GAO's "interested party" definition to determine standing significantly restricts standing in bid protests. If the *Info Systems* judge had used the normal APA analysis, he would have been hard pressed to find that Info Systems did not meet the standing threshold.[132] Under the APA, standing is

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[129] *American Fed'n of Gov't Employees, AFL-CIO, Local 2119, et al v. Cohen*, 171 F.3d 460, 472 (7th Cir. 1999)(hereinafter "*AFGE Local 2119*")(the Seventh Circuit found the union's interest in continued employment for its members was not within CICA's zone of interests and that the union had to have standing in its own right).

[130] *See* Fedrick W. Claybrook, Jr., *The Initial Experience of the Court of Federal Claims in Applying the Administrative Procedure Act in Bid Protest Actions – Learning Lessons All Over Again*, 29 PUB. CONT. L.J. 1, 48 (1999).

[131] There are exceptions: *Rapides Regional Medical Center v. Dept of Veterans' Affairs*, 974 F. 2d 565, 570 (5th Cir. 1992), *cert. denied*, 508 U.S. 939 (1993)(in a protest premised upon issues involving the full and open competition requirements in the CICA, the judge incorporated the GAO definition into a hybrid standing test which incorporated the APA and the GAO concepts); *Waste Management of North America, Inc. v. Weinberger*, 862 F.2d 1393, 1396 (9th Cir. 1988)(court applied GAO's definition of "interested party" in determining standing of bid protester emphasizing that "interested parties are actual or prospective bidders." The court found the protester lacked standing because it "neither filed a proper bid protest nor submitted a bid").

[132] The issue of whether subcontractors should be granted standing as interested parties is discussed in greater detail in a later section.

not restricted to "an actual or prospective bidder or offeror" but rather to someone who has suffered an "injury in fact" within the "zone of interests" sought to be protected under the statute.[133]

While Info Systems' ability to satisfy the "injury in fact" was not in question, the issue of whether it falls within the protected "zone of interests" should have been answered in the affirmative by the court. It has been said that the "'zone of interest' test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision."[134]

The judge, analyzing Info Systems as a subcontractor, determined that it was not the type of plaintiff that could sue. However, Info Systems was a prime contractor whose status changed to that of a subcontractor because of the government's allegedly illegal activity. Therefore, the court should have looked at the total circumstances and asked whether "if the allegations were true, would Info Systems be the particular plaintiff that Congress would want to complain about these particular agency decisions?" After all, if Info Systems were truly "blacklisted", it is the *only* one who would complain. Congress does not expect one of Info Systems' competitors to complain on its behalf, nor, under the circumstances, the prime contractor, Unisys. It is reasonable to assume, that Unisys decided it would be better

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[133] *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

to forgo a bid rather than risk upsetting its relationship with the government by either insisting that it use Info Systems or by suing if NIEHS failed to award it the contract.[135]

Finally, the *Info Systems* judge ignored the fact that the "zone of interest test is not meant to be especially demanding...."[136] It requires only that Info Systems be granted standing unless its interest is no more than marginally related to or in fact inconsistent with the implicit purposes of the relevant statute.[137] Whether the relevant statute in this case is the CICA, the APA or the ADRA, Info Systems' interests were more than marginally related to and certainly not inconsistent with any of the aforementioned statutes.

### C. Court Of Federal Claims

#### (1) Defining Interested Parties

For reasons explored later in this thesis, judges at the COFC, for the most part, do not look to decisions of the district courts in determining whether a protester qualifies as an interested party. However, the COFC has looked to the GAO. In

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[134] *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987).

[135] *See Info Systems*, 970 F. Supp. 1 (D.C. Cir. 1997).

[136] *Clarke*, 479 U.S. at 399-400.

[137] *See generally National Federation of Federal Employees, et al. v. Cheney*, 883 F.2d 1038 (1989) (interpreting the Supreme Court's formulation of the "zone of interest test" in *Clarke*, 479 U.S. 388).

fact, decisions of the COFC are split on whether the GAO definition of "interested parties" should be strictly applied.

Recall that the court's pre-ADRA bid protest jurisdiction was founded on the theory of an implied-in-fact contract of fair and honest consideration. Thus, COFC in the past held that only an actual offeror or bidder had standing to file a bid protest.[138] Most COFC judges believe that the ADRA dispensed with this "implied-in-fact jurisdiction" replacing it with the "interested party" standing.[139]

The first post-award bid protest case to be heard at the COFC to discuss the interested party quagmire was *Cincom Systems, Incorporated.*[140] Without a § 1491 definition of interested party, the *Cincom* court recited the GAO definition and relied

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[138] As the COFC explained "a contractor's mere participation in a solicitation (by submitting information or a proposal other than a formal bid) does not give the contractor standing to invoke this court's bid protest jurisdiction." *Control Data Systems, Inc. v. United States*, 32 Fed. Cl. 520, 524 (citing *Motorola Inc. v. United States*, 988 F.2d 113, 116 (Fed. Cir. 1993).

[139] *See CCL, Inc. v. United States*, 39 Fed. Cl. 780, 790 (1997) (Congress intended that COFC "dispense with its historical and somewhat quixotic search for the fictional 'implied contract of good faith and fair dealing,' which only arose in the presence of a bid"); *but see Unified Architecture & Engineering, Inc. v. United States*, 46 Fed. Cl. 56, 60-61 (2000)("... the [ADRA] amendments do not supercede the implied contract theory of good faith and honest consideration.... The court finds that the ADRA makes no mention of the breach of implied contract theory, nor does it alter § 1491(a) of the Tucker Act, which authorizes this court to hear claims against the United States that are founded upon implied contracts with the United States").

[140] *Cincom Systems, Inc., v. United States*, 37 Fed. Cl. 663 (1997). The first post-award bid protest case heard after the revised statute came into effect was *Cubic Applications, Inc., v. United States*, 37 Fed. Cl. 339 (1997). While this case briefly discussed the court's expanded jurisdiction, it lacked the need to discuss the issue of standing since the plaintiff was the incumbent who had unsuccessfully competed for the new award.

upon the Court of Appeals for the Federal Circuit (CAFC) interpretation of this term in the pre-ADRA case of *Federal Data Corporation.*[141] The CAFC interpreted interested party to mean that a protest may be initiated "only by an actual or prospective bidder who would have been in a position to receive the challenged award."[142] The *Cincom* court found that the plaintiff passed the initial screening evaluation phase as required in the solicitation and therefore was an interested party with a "direct economic interest that would be affected by the award of a contract or failure to award the contract."[143]

The next case in this area, *ATA Defense Industries*[144] is discussed in more detail later in this paper. This case definitely caught the attention of procurement officials with its decision granting a non-schedule contractor standing to challenge a Federal Service Supply (FSS) contract. However, the case was not beneficial in providing direction on COFC's standing requirements. The court held that:[145]

> [I]t is not necessary, however, for this court to resolve whether Congress intended the term 'interested party' to be defined as set forth in other statutes because, although certainly not an 'actual' bidder, plaintiff was a

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[141] *Federal Data Corp. v. United States*, 911 F.2d 699 (Fed. Cir. 1990).

[142] *Id.* at 706.

[143] *Cincom*, 37 Fed. Cl. at 670 *citing Federal Data Corp*, 911 F.2d 699 *quoting United States v. International Business Machines Corp.*, 892 F.2d 1006, 1010 (Fed. Cir. 1989).

[144] *ATA Defense Industries, Inc. v. United States*, 38 Fed. Cl. 489 (1997).

[145] *Id.* at 494.

> 'prospective bidder . . . whose direct economic interest would be affected by the award of the contract.' Hence, plaintiff would qualify as an interested party even under the [GAO] definition set forth in Section 3551(2).

Similarly, the *Delbert Wheeler*[146] court stated that the Tucker Act amendments fail to delineate whether to use the GAO or the "APA standing definition" in determining interested party status. The *Delbert Wheeler* judge held that since the plaintiff in that case could be granted standing under the narrower GAO standard, the issue of standing would not change under the broader APA analysis on standing.[147]

The first two cases to take this issue head-on were *CC Distributors*[148] and *CCL*.[149] In September, 1997, Judge Horn in *CC Distributors* concluded that Congress intended the federal courts to follow the GAO definition of interested party. Applying the GAO definition, Judge Horn dismissed a post-award protest by a protester that had not submitted a proposal.

In this case, CC Distributors operated a Civil Engineering Supply Store ("Supply Store")[150] at Tyndall Air Force Base (AFB), Florida. CC Distributors

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[146] *Delbert Wheeler Constr., Inc. v. United States*, 39 Fed. Cl. 239 (1997).

[147] *Id.* at 245.

[148] *CC Distributors, Inc. v. United States*, 38 Fed. Cl. 771 (1997).

[149] *CCL, Inc. v. United States*, 39 Fed. Cl. 780 (1997).

[150] The supply store is described as a hardware, construction materials and building supply store that supports civil engineering personnel performing maintenance and (continued ...)

provided these services pursuant to its contract with the Air Force. This one-year contract included two six-month option periods. The first option was renewed. Instead of renewing the second option, the Air Force issued a new solicitation that included services previously performed by CC Distributors. CC Distributors did not compete for the new contract and it was awarded to DEL-JEN, Incorporated.

Subsequently, CC Distributors protested this solicitation alleging that the Air Force failed to provide adequate notice of the solicitation and that the Air Force improperly consolidated the requirement for operating the Supply Store with other engineering maintenance and repair services. According to CC Distributors' complaint, the Air Force "published a notice in the Commerce Business Daily (CBD) to solicit potential contractors to provide 'Base Operating Support Services' to be performed at Tyndall AFB... ."[151] This new contract was written as "covering four 'functional area groupings,' including 'civil engineering,' 'transportation,' 'supply/fuels' and 'information management.'"[152] Approximately 2 months later, the Air Force published an amended notice in the CBD which, among other things, announced that the contract could be partitioned, by functional area groupings, thereby allowing

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repair services on buildings located on Tyndall AFB. *CC Distributors*, 38 Fed. Cl. at 772.

[151] *Id.* at 773.

[152] *Id.* at 773.

different contractors for the various functional areas.[153] CC Distributors claimed that the only reason it did not compete for this new contract was because there was no indication in the notice or the amended notice that the Air Force intended to consume the Supply Store function in this new contract.

The government argued that as a nonbidder, CC Distributors was not an "interested party" under the ADRA. CC Distributors, on the other hand, urged the court to adopt a broad, plain meaning definition of interested party to include any entity liable to be affected or prejudiced. CC Distributors also argued that a plain, broad meaning of interested party is consistent with the APA law on standing as applied by district courts.[154]

The court found that CC Distributors' proposal would mean that the term "interested party" would have one meaning at GAO and another at the COFC. While the court said that such a "definitional scheme is not per se impossible", it was not persuaded to adopt it stating:[155]

> If Congress had expressed an intention to have the same words defined differently in different fora, that would be within the prerogative of the Congress, and the courts would carry out that Congressional intent. However, in the absence of evidence of a Congressional intent to deviate from the settled use and interpretation of a term of art, the effect of which would be to potentially expand

[153] *Id.* at 773.

[154] *Id.* at 777.

[155] *Id.* at 778-79.

> significantly the population of protesters, this court is reluctant to embrace the proposed regime of dual definitions. In the absence of a contrary indication, the court finds it appropriate to conclude that Congress intended the amendments in 28 U.S.C.A. § 1491(b)(1) to follow the established, or term of art, meaning of "interested party," as defined by the Congress in the GAO statute, and as reaffirmed by the Congress just six months prior to the enactment of the amendments to 28 U.S.C. § 1491.

Despite Judge Horn's lengthy opinion on the issue of interested party, Judge Bruggink, in a well-thought out opinion, only two months later decided not to follow it in *CCL*.[156]

The protester in *CCL* was awarded an indefinite quantity/indefinite delivery contract with the Defense Information Systems Agency (DISA) to provide computer maintenance services at an Air Force facility in Denver. The contract was for a total of five years, including option years. Two years later, DISA decided not to exercise CCL's option. Subsequently, BDM International's contract was modified to include the services previously performed by CCL. CCL contends that this modification amounts to a new contract, which was awarded without competition in violation of the CICA.

Predictably, the defendant in *CCL* urged the Court to apply the GAO definition of interested party. The government argued that since it had decided not to compete the challenged services (just modified an existing contract with another

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[156] *CCL, Inc. v. United States*, 39 Fed. Cl. 780 (1997).

firm), CCL could not be "an actual or prospective bidder" and therefore lacked standing to bring the lawsuit.

In disagreeing with the defendant's argument, Judge Bruggink became the first judge at the COFC to refuse to apply the GAO definition. During an elaborate discussion of the standing issue,[157] Judge Bruggink stated that while it made sense to use the GAO definition "as a means of informing the discussion, it does not follow that it necessarily represents the four corners of potential standing under the new legislation."[158]

The court held that where a plaintiff alleges that the government violated CICA by refusing to engage in a competitive procurement, it is sufficient for standing purposes, if the plaintiff shows that it likely *would have* competed for the contract had the government publicly invited bids or requested proposals.[159] Therefore, despite the absence of a solicitation or the submission of proposals, the judge found CCL an interested party because it would have competed for some or all of the work under BDM International's modification.

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[157] Judge Bruggink's analysis on standing is discussed in more detail later in this thesis.

[158] *CCL*, 39 Fed. Cl. at 789.

[159] *Id.* at 790.

### (2) The COFC Going A Mile Further: Non-schedule Contractor has Standing to Challenge a FSS Contract

In addition to the *CCL* opinion, Judge Andewelt, in the *ATA Defense Industries*[160] decision, also cautioned against a wholesale adoption of the GAO's standing requirements. The *ATA* opinion did not require the judge to resolve whether Congress intended the term "interested party" to be defined as in the narrower GAO definition or from the application of the plain meaning of the ADRA. However, this case illustrates the importance of a broader interpretation of "interested party". The *ATA* judge granted standing to a protester challenging a procurement for which it was ineligible to bid in order to correct a serious CICA violation.

In the case of *ATA*, [161] the Government argued that the plaintiff was not listed on the Federal Supply Schedule (FSS) and thus could not represent a prospective bidder who could challenge the FSS procurement. The court rejected this argument finding that ATA qualified as an "interested party" even under the narrower definition set forth in § 3551(2) in that ATA was a "prospective bidder... whose direct economic interest would be affected by the award of the contract."[162]

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[160] *ATA Defense Industries, Inc. v. United States*, 38 Fed. Cl. 489 (1997).

[161] *Id.*

[162] *Id.* at 492.

The *ATA* court granted the plaintiff a permanent injunction ordering the Army to suspend performance of a purchase order contract awarded to Caswell International. This purchase order contract covered the upgrading of two target ranges at Ft Stewart, GA. The contracting officer limited his search for potential suppliers to those with Federal Supply Schedule agreements and concluded that Caswell was the only firm with an FSS agreement that could meet the Army's requirements. Even though plaintiff was a competitor of Caswell in the sale of products and services used in upgrading target ranges for the Army, it was not listed on the FSS. However, the order placed by the Army for the upgrade with Caswell contained thirty-five percent of products and services that were not listed on the FSS.

ATA argued that it could compete with Caswell for the products and services required to upgrade the target ranges, but the Army, in violation of CICA, denied it the opportunity to compete. According to ATA, this thirty-five percent of non-FSS products and services should have been a separate contract subject to a full and open competition. Among other things,[163] the government argued that the court lacked jurisdiction since plaintiff was not an interested party.

[163] The contracting officer initially sought to justify the award on the basis that Caswell was the only source capable of meeting the Army's needs. After ATA filed this protest, the contracting officer then cited urgent and compelling circumstances as a rationale for the award to Caswell. Judge Andewelt found both justifications to be insufficient.

The Army based its argument that ATA was not a "prospective bidder" primarily on *MCI Telecom v. United States*.[164] The government stated that the MCI case stands for the proposition that, to be a "prospective bidder" a party must expect to submit a bid. It further stated that ATA could not have expected to submit a bid because the Army had announced its intention to purchase the products and services against the FSS, and ATA did not have a FSS contract. Additionally, the Army argued that even if ATA were a prospective bidder prior to contract award, it could not be considered such at the time it filed the protest because the contract had already been awarded. The court rejected both of these arguments.

The *ATA* court found that the statutory language of § 1491 provides the court with jurisdiction without regard to whether the suit is before or after award. Furthermore, Judge Andewelt considered the defendant's interpretation of "prospective bidder" to be too restrictive. The defendant's interpretation would have render a party not an "interested party" where, for example: (1) the party expressed its intent to bid on the contract work (2) was precluded from bidding in violation of statutes and regulations, and (3) would have prevailed had it been allowed to bid.

The *ATA* court cited a federal circuit case, *Rapides Regional Med. Center*,[165] as adopting the same view. In this case, the court concluded that a plaintiff that had not been given the opportunity to present a bid and had filed a protest after the

[164] 878 F.2d 362 (Fed. Cir. 1989).

government had entered the disputed agreement was a 'respective bidder' under 31 U.S.C. § 3551(2).[166] The *Rapides* court's rational was because the plaintiff (like ATA) had "stood ready and willing to participate... had it been offered the opportunity to do so."[167]

Importantly, the court also rejected the Army's argument that the purchase of non-FSS products and services should be upheld as "incidental" to the goods obtained through Caswell's FSS contract. Judge Andewelt stressed that CICA states that an agency shall obtain full and open competition through the use of competitive procedures unless an exception applies. The court emphasized that there is no exception under CICA that even arguably covers incidentals.

Without this "incidentals" issue, ATA would not have been granted standing. Clearly, Judge Andewelt felt strongly that the Army had committed a CICA violation by ordering thirty-five percent of goods and services that exceeded the scope of the FSS contract. Obviously, the court need an "interested party" to be able to correct this serious procurement infraction.

Even though Judge Andewelt's opinion found that ATA met the restrictive GAO standing analysis, another COFC judge applying this same standard, even with

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[165] *Rapides Regional Med. Center v. Dept of Veterans' Affairs*, 974 F.2d 565 (5th Cir. 1992).

[166] *Id.* at 570.

[167] *Id.*

the "incidentals" issue, could have easily ruled against ATA. A *true* application of the GAO's definition of "interested party" would mean that a non-FSS contractor would not be able to challenge a FSS procurement because a non-FSS contractor is not and can not be an "actual or prospective bidder or offeror" on a FSS contract. In the case of *ATA* under a *true* GAO analysis, the Army's procurement infraction would go without redress since a FSS contractor did not challenge the procurement.

Fortunately for bid protesters, the most recent bid protest case, *American Fed'n of Gov't Employees (AFGE, Local 1482)*[168] discussed below, agrees that the COFC should not adopt the GAO's standing analysis. However, a survey of these recent cases prove that the COFC is still struggling to define who has standing to bring a bid protest.

### (3) Recent Cases: Continued Inconsistent Results for Bid Protesters Though One Case, *AFGE, Local 1482*, Favors Bidders

Cases in the first half of 2000, in particular the *AFGE, Local 1482* case, indicate that COFC's struggle to define and interpret the term "interested party" is drawing to an end. The trend of these most recent cases indicates that the COFC is moving away from applying the GAO definition and toward the APA standing requirements. While these cases warrant optimism, caution is necessary as the COFC

[168] *American Fed'n of Gov't Employees, AFL-CIO, Local 1482, et al v. United States*, 46 Fed. Cl. 586 (2000) (hereinafter "*AFGE Local 1482*").

reached seemingly inconsistent decisions in two cases in 1999 that addressed a protester's status as an "interested party."[169]

The first case discussed in this section is *Ryan Co.* where Judge Allegra agreed with the government that the protester's bid was nonresponsive because it did not include the required manufacturer's catalog cuts.[170] Accordingly, the court held that not only was the protester ineligible for the award, but as a nonresponsive bidder, it was not an "interested party." Therefore, Ryan was not able to challenge aspects of the awardee's bid. Judge Allegra stated that "the phrase 'interested party', as used in 28 U.S.C. § 1491(b), does not include a bidder... determined to be nonresponsive, whose only chance of winning a contract is in a resolicitation."[171] According to the opinion, a nonresponsive bidder is no different than a "proverbial man on the street."[172]

In contrast is Judge Weinstein's decision in *Anderson Columbia Envtl., Inc.*.[173] Despite that the Judge found the protester's bid to be nonresponsive, she allowed the

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[169] *See also* James J. McCullough, et. al, *Third Year of COFC Postaward Bid Protest Jurisdiction: A Work in Progress,* 42 THE GOV'T CONTRACTOR 15 (2000) for more discussion on these cases.

[170] *Ryan Co. v. United States*, 43 Fed. Cl. 646, 649 (1999).

[171] *Id.* at 657.

[172] *Id.*

[173] *Anderson Columbia Envtl., Inc. v. United States*, 43 Fed. Cl. 693 (1999). This case is sometimes referred to as "*Anderson Columbia II*" as it follows the opinion of *Anderson Columbia Envtl., Inc v. United States*, 42 Fed. Cl. 880 (1999) where Judge Weinstein (continued ...)

protester to challenge alleged procurement violations. The opinion failed to address why a nonresponsive bidder has standing as an interested party.

The Judge's analysis in this case is also inconsistent with the "first" *Anderson Columbia Envtl., Inc.* opinion. In this same case, in a breach from the norm, Judge Weinstein denied interested party status to an intervenor after a detailed analysis of § 1491. Especially in light of her earlier *Anderson Columbia* opinion, it is inexplicable as to why, when the judge reached the merits of the case in "*Anderson Columbia II*", the issue of whether the protester was an interested party did not arise.

The first bid protest case of year 2000 to address the issue of "interested party" and the jurisdictional scope of the Tucker Act at the COFC was *Phoenix Air Group, Inc.*[174]. While Judge Horn did not directly state which definition of interested party should be applied at the COFC, the opinion gives insight into the direction that the court is taking on this issue. Recall that Judge Horn wrote the *CC Distributors, Inc.*[175] opinion denying interested party status to the incumbent contractor.

In that case, Judge Horn concluded that Congress intended the amendments in 28 U.S.C.A. § 1491(b)(1) to follow the "established, or term of art, meaning of

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denied interested party status to an intervenor because it was not filing an action challenging the award.

[174] *Phoenix Air Group, Inc. v. United States*, 46 Fed. Cl. 90 (2000).

[175] *CC Distributors, Inc. v. United States*, 38 Fed. Cl. 771 (1997).

'interested party', as defined by the Congress in the GAO statute...."[176] Judge Horn stated that she was not persuaded that the court should adopt "a regime of dual definitions" where the definition of interested party would be different at the COFC than the definition at the GAO.[177]

However, in the recent *Phoenix* case[178], it was clear that Judge Horn had backed away from her earlier *CC Distributors* decision to strictly apply the GAO definition. Rather than relying upon the *CC Distributors* language that denied that plaintiff standing, Judge Horn took the middle ground in *Phoenix*. She cited COFC cases that acknowledged the statutory definition of interested party used by the GAO to determine its bid protest jurisdiction[179] as well as cases that only used the GAO definition as instructive, but not conclusive.[180]

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[176] *Id.* at 778-779.

[177] *Id.*

[178] The facts of *Phoenix*, 46 Fed. Cl. 90 are discussed in section IV(D) of this paper.

[179] Specifically, the opinion states "[c]ases in the Court of Federal Claims acknowleges the statutory definition of 'interested party' used by the General Accounting Office (GAO) to determine its bid protest jurisdiction. *See, e.g., Cubic Defense Systems, Inc. v. United States,* 45 Fed. Cl. 239, 246-48 appeal dismissed by parties... (Fed. Cir. Dec. 22, 1999); *CCL, Inc. v. United States,* 39 Fed. Cl. [780], 789." *Phoenix*, 46 Fed. Cl. at 101.

[180] Judge Horn stated "[t]he cases in this court also have noted the differences between the statutes governing the bid protest jurisdiction of this court and of the GAO, and, thus, have treated the GAO definition as instructive, but not conclusive. See, e.g., *Winstar Communications, Inc. v. United States,* 41 Fed. Cl. 748, 756 (1998) (looking to GAO statute's definition "for guidance"); *CCL,* 39 Fed. Cl. at 789-90 (finding the 'thrust' of the GAO definition relevant, but noting that it does not necessarily represent 'the four corners of potential standing' under § 1491(b)); *Delbert* (continued ...)

Importantly, by taking this middle ground, the judge recognized and thus gave credence to the fact that there is a viable alternative to strictly applying the GAO definition. She stated that "[t]he fact that a concrete definition for 'interested party' under the Tucker Act has yet precisely to be delineated is not critical for this case, as the court finds that Phoenix would be an 'interested party' under either *the plain meaning of the phrase in the Tucker Act* or under the GAO statutory definition."[181]

Although the *Phoenix* decision did not discuss what this other test (referred to as the plain meaning of the statute by Judge Horn) would be, the latest bid protest case, *AFGE, Local 1482,*[182] squarely addressed this issue. Before getting into the details of this opinion, it is interesting to note that Judge Firestone incorrectly stated in *AFGE, Local 1482* that it was the first case that had to decide whether the term "interested party" under the ADRA is limited to those parties covered by CICA. The Judge cited several COFC cases stating that in these cases the court ultimately did not have to decide the issue because the plaintiffs were actual or prospective bidders who

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*Wheeler Constr., Inc. v. United States,* 39 Fed. Cl. 239, 245 & n.11 (1997) (employing the GAO statute's definition, but describing it as 'narrower'), *aff'd,* 155 F.3d 566 (Fed. Cir. 1998); *ATA Defense Indus., Inc. v. United States,* 38 Fed. Cl. 489, 494 (1997)(stating that 'the definition of 'interested party' in Section 3551(2) arguably is more narrow than the definition that would flow from the application of the plain meaning of Section 1491(b).')." *Phoenix,* 46 Fed. Cl. at 102.

[181] *Phoenix,* 46 Fed. Cl. at 101-02 (emphasis added).

[182] *AFGE Local 1482,* 46 Fed. Cl. 586 (2000).

satisfied the GAO test.[183] This statement overlooks the case just discussed, *CC Distributors,*[184] a prominent case in this area where Judge Horn in fact squarely addressed this issue deciding that Congress intended the COFC to follow the CICA definition of interested party. Putting aside this discrepancy, Judge Firestone's *AFGE, Local 1482* opinion will be hailed by future bid protesters and their attorneys as articulating the analysis that the other judges at the COFC should follow in deciding who is an interested party under the ADRA.[185]

As to the facts of *AFGE, Local 1482* the plaintiffs are two federal employees and their unions challenging the Defense Logistics Agency's (DLA) final cost comparison, which led the government to contract out the work previously done in part by these employees. Judge Firestone rejected the government's argument that standing should be limited under the ADRA to those who meet the GAO or CICA definition of interested party. Instead, after a comprehensive examination of the ADRA, the judge concluded that the test applied by the district courts under the APA is appropriate for determining interested party status under the ADRA.[186] After applying the standing analysis under the APA, the court found that the plaintiffs were

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[183] *Id.* at 591-92.

[184] *CC Distributors, Inc. v. United States*, 38 Fed. Cl. 771 (1997).

[185] The analysis of *AFGE, Local 1482* is discussed in more detail in the next section of this paper.

[186] *AFGE, Local 1482*, 46 Fed. Cl. at 595.

not actually interested parties because they were not within the zone of interests to be protected by the statutes that they alleged were violated. [187]

The significant element of *AFGE, Local 1482* is that finally a judge at the COFC recognized the importance of looking toward the district court bid protest cases in determining jurisdiction rather than looking toward the GAO. For the reasons discussed below, hopefully, more COFC judges will follow the convincing analysis of Judge Firestone's *AFGE, Local 1482* opinion in determining who is an interested party.[188]

## IV. FINAL ANALYSIS OF DETERMINING WHO SHOULD BE AN "INTERESTED PARTY" IN FEDERAL COURTS

This section advances the idea that the APA standing requirements should be applied to bid protesters under the ADRA. Since the district courts already apply the APA in their cases,[189] the focus of this section is on the COFC.

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[187] *Id.* at 597-98. Furthermore, these same requirements are discussed again in section IV of this paper.

[188] The case to watch for is *CHE Consulting, Inc. v. United States*, __ Fed. Cl. ___ (2000). This bid protest opinion, written by Judge Emily Hewitt, is expected to be the next COFC case dealing with the interested party definitional scheme.

[189] With *Info Systems*, 970 F. Supp. 1 (D.C. Cir. 1997) being the only exception (judge denied standing to plaintiff based on its failure to meet the GAO's definition of interested party).

### A. The GAO Definition Should Not be Adopted by the Federal Courts

While adopting GAO's definition of interested party would be the easiest route for the courts to take, they should resist this temptation. This GAO definition significantly restricts jurisdiction for bid protesters. Applying the definition of "interested party" in 31 U.S.C. § 3551(2) to §1491(b) would limit plaintiffs to only actual and prospective bidders. A technical interpretation of this statute would deny a plaintiff "interested party" status where, for example, the plaintiff had expressed its desire to bid on the procurement but was precluded from bidding due to government violations of controlling statutes and regulations.[190] Furthermore, this standard is more rigorous than the normal APA standing requirements discussed by *Scanwell* that the district courts have used for decades in their bid protests cases.

Since the COFC is primarily the federal court that has applied the GAO definition to bid protesters, this section focuses more on that court than the district courts. However, the analysis in this section does apply to the district courts as well

[190] *See ATA Defense Industries, Inc. v. United States*, 38 Fed. Cl. 489, 497 (1997). As explained by the *ATA* court, this view was adopted by the Court of Appeals for the Fifth Circuit in *Rapides Reg'l Med. Cen. v. Dept of Veterans' Affairs*, 974 F.2d 565 (5th Cir. 1992). This Court of Appeals case concluded that a plaintiff who had been denied the opportunity to present a bid and had filed a protest after the government had entered the disputed agreement was a "respective bidder" under § 3551 because the plaintiff "stood ready and willing to participate . . . had it been offered the opportunity to do so." *Id.* at 570.

especially in light of the *Info Systems* opinion, which denied standing to a plaintiff that was unable to meet the GAO definition of interested party.[191]

The court in *CCL*[192] gave the following two reasons why the COFC should not adopt the GAO definition. First, GAO enforces a different statute than 28 U.S.C.A. § 1491(b)(1), and the issue of standing as it relates to post-award bid protests should be applied in the context of the statute granting the COFC jurisdiction over such claims. And second, that the language enforced by GAO is not identical. While the COFC is given jurisdiction to hear protests filed under 28 U.S.C.A. § 1491(b)(1), GAO has jurisdiction to hear protests filed under 31 U.S.C. § 3551(2) which limits the phrase "interested party" to be used in connection with contracts, solicitations, or requests for offers.

The language of the ADRA is not so limited. This statute recognizes the situation where the plaintiff alleges a violation of statute or regulation in connection with a procurement or a proposed procurement. Cases have recognized that the "operative phrase 'in connection with' is very sweeping in scope. As long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction."[193] Accordingly, the differences of these two statutes should give the

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[191] *Info Systems*, 970 F. Supp. 1 (D.C. Cir. 1997). This case was discussed extensively in section III (B) of this paper.

[192] *CCL, Inc. v. United States*, 39 Fed. Cl. 780 (1997).

[193] *Ramcor Servs. Group, Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999). *See also Phoenix Air Group, Inc. v. United States*, 46 Fed. Cl. 90, 101 (2000).

COFC pause to presumptively limit standing to the GAO definition of "interested party."

Adopting the GAO definition would be logical if the purpose of ADRA was to standardize the federal courts practice in this area with that of GAO. However, the principal purpose of ADRA is to provide bid protesters concurrent jurisdiction in the COFC and district courts. When the ADRA was drafted, Congress was fully aware of the bid protest jurisdiction in the district courts under *Scanwell.*

With ADRA, Congress wanted to create the situation where if one court had jurisdiction to hear the protester's case, then so would the other court.[194] No longer would bid protest cases be bifurcated: whether pre-award or post-award, the protester now has the choice to file his complaint either at the COFC or district court. Senator Levin, the primary sponsor of § 1491(b)(1), stated that "[e]ach court system [the COFC and the district courts] would exercise jurisdiction over the full range of bid protest cases previously subject to review in either system" (emphasis added).[195] This can mean only one thing: that COFC was to adopt Scanwell rules on bid protest jurisdiction as developed by the district courts under the APA.[196] There is no

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[194] It is debatable whether Congress intended the bifurcated system or whether it was just the result of poor statutory draftsmanship.

[195] 142 Cong. Rec. S11, 849 (1996)(daily ed. Sept. 30, 1996)(statement of Senator Levin).

[196] *See also* Claybrook, *supra* note 130, at 48.

legislative history to suggest that Congress intended ADRA to change the APA standing rules that have been applied by the district courts for so many years.

Importantly, after § 1491(b) gave district courts express jurisdiction over bid protests, district court judges did not interpret "interested party" in this statute to mean the same as the GAO definition.[197] District court judges (to the extent they even know about § 1491) recognize § 1491(b) for what it is: an express license to keep doing what they were doing under *Scanwell*. Thus, they continue applying APA standing law in determining whether the bid protester has jurisdiction.

### B. Why Some Judges at the COFC Adopted the GAO's Standard on Standing

Several reasons explain why the COFC, unlike the district courts, has a split in decisions over adopting the GAO definition. COFC judges are not accustomed to looking toward the district courts for guidance. They also do not have the same breadth of experience with application of the APA rules on standing. Most of the plaintiffs knocking on the COFC's doors are there at the direction of a statute and thus standing is not usually an issue.[198] Moreover, since COFC is accustomed to looking toward GAO for guidance on other procurement issues, it was natural to

[197] Again, the exception is *Info Systems*, 970 F. Supp. 1 (D.C. Cir. 1997).

[198] With the obvious exception of the ADRA failing to define the term "interested party."

continue this practice when the issue of who qualifies as an interested party first arose.

The judges adopting the GAO definition did so under the argument that since both CICA and § 1491(b) are procurement statutes dealing with bid protests, Congress must have intended the term "interested party" to have the same meaning in both statutes.[199] This argument is premised upon the theory that by enacting the ADRA, Congress wanted to ensure bid protesters received consistent treatment in the courts and GAO.

This argument is unpersuasive for several reasons.[200] As stated previously, the purpose of ADRA was not to standardize the federal courts' practice with that of GAO but rather the practices of the COFC with those of the district courts. Accordingly, if Congress had intended the ADRA to change the standing rules under *Scanwell*, thereby changing decades of practice in the district courts, it would have said so.

### C. Alternatives to the GAO's Standing Requirements

There are at least two alternatives to following the GAO's statutory definition of interested party. The first alternative is to give meaning to the term by simply

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[199] *See CC Distributors, Inc. v. United States*, 38 Fed. Cl. 771, 778-79 (1997).

[200] *See* Claybrook, *supra* note 130.

looking directly to the language of § 1491(b)(1). The second and better alternative is to apply the APA standing analysis used by the federal district courts.

### (1) Broad, Permissive Definition of Interested Party

Under this broad, permissive definition,[201] arguably a plaintiff "interested" enough to object to any alleged violation of statute or regulation in connection with a procurement would have standing.

This interpretation is broader than the APA standards for standing and the judges at the COFC have rejected plaintiffs efforts in urging the courts to adopt a broad, permissive definition of the term "interested party". One such plaintiff requested the court to employ the definition of this term as defined in Webster's Third International Dictionary (1978): "having a share or concern in some affair or project; liable to be affected or prejudiced."[202] While the court, in light of the fact that it adopted the restrictive CICA definition, may not have seriously considered this definition, it is not far from the mark. The language "liable to be affected or prejudiced" is broader than but certainly similar to APA's "adversely affected or aggrieved party" description who has standing to complain about a governmental action.

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[201] Some of the cases refer to the broad, permissive definition of interested party as the "plain meaning" definition of the term.

[202] *CC Distributors*, 38 Fed. Cl. at 777 (1997).

This broad, permissive definition implies that Congress intentionally left the phrase interested party undefined in order to expand standing in bid protest actions under § 1491. If the courts accepted this approach, judges would have to virtually write a brand new definition of "interested party" to employ in bid protest cases. With the result being that decisions interpreting who qualifies as an interested party would be more inconsistent than they are now. This inconsistency would not benefit bid protesters or further the interests of the government procurement system. Furthermore, there is no indication in the legislative history that Congress intended this expansion of bid protest jurisdiction.

### (2) The Better View: District Courts' Test under the APA is Appropriate for Determining Interested Party Status under the ADRA

While a broader meaning of the term "interested party" is consistent with the APA, the better view is to equate interested party status under § 1491(b)(1) with aggrieved party standing under the APA.[203] Thus, instead of adopting or even seeking guidance from the GAO definition of interested party, the judges at the COFC should adopt the district courts' approach to standing under the APA. In deciding this issue, the courts must look to the language and legislative history of the ADRA.

[203] *See* Claybrook, *supra* note 130.

As reviewed earlier in this paper, prior to the enactment of the ADRA, jurisdiction over bid protests was divided between the COFC, which heard pre-award bid protests under the Tucker Act, 28 U.S.C. § 1491(a) and the district courts which heard post-award bid protests under the APA. Congress enacted the ADRA to expand the jurisdiction of both the COFC and the district courts to allow both courts to hear "full range of cases previously subject to review in either system."[204]

Accordingly, the jurisdiction of the COFC under the ADRA should include the bid protest cases that were previously heard exclusively in the federal district courts, in addition to the same bid protest jurisdiction the COFC exercised prior to the ADRA.[205] To determine whether a bid protester's case would be heard at the district court, the COFC must apply the same standing analysis under the APA as the district courts.

The statutory language in the ADRA that the APA standard of review should apply lends credence to applying this APA analysis in that all bid protest actions in federal courts should be treated like every other APA action.[206] Some of the COFC judges have rejected this APA approach. Their argument is that while the APA is specifically referenced in the ADRA, the reference is to 5 U.S.C. § 706, pertaining to

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[204] *See* 142 Cong. Rec. S11848-01, S11849-50 (daily ed. Sept. 30, 1996)(statement of Sen. Levin). *See also AFGE, Local 1482*, 46 Fed. Cl. 586, 593 (2000).

[205] *Id.* at 595.

[206] Claybrook, *supra* note 130.

the standard of review, and not to 5 U.S.C. § 702, the APA section on standing. Having found the omission of 5 U.S.C. § 702 to be significant, these judges cite it as evidence that Congress intended standing under § 1491 to be narrower than that of the APA.[207] However, this logic is faulty since, this "omission test" did not stop those same judges from applying the GAO's definition despite its omission from the ADRA.

The case law indicates that the COFC is receptive to adopting the normal APA standing standards to government procurement actions. Rather than adopting the GAO's definition, the COFC has announced a two-part test to determine who is "interested party."[208] First, the party must show some connection to the procurement. Second, the party must have an economic interest in the procurement.

This approach is similar to the standing requirements that have been applied in connection with the APA. However, the better approach is to follow Judge Firestone's *AFGE, Local 1482* analysis in applying the APA test *exactly* as the district courts do rather than a modified APA version illustrated above.

The requirements for establishing standing under the APA are after all well settled. Protesters challenging an agency decision on the APA must demonstrate

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[207] *See Ryan Co. v. United States*, 43 Fed. Cl. 646 (Fed. Cl. 1999). *CC Distributors*, 38 Fed. Cl. 771 (1997).

[208] *Cubic Defense Systems*, 45 Fed. Cl. 239, 249 (Fed. Cl. 1999) *citing CCL, Inc. v. United States*, 39 Fed. Cl. 780, 790 (1997).

that:[209] (1) they have suffered "injury-in-fact;" (2) that the injury is "fairly traceable" to the agency's decision and is "likely to be redressed by a favorable decision;" (3) that the interests sought to be protected are "arguably within the zone of interests to be protected or regulated by the statute... in question."

This broader interpretation of "interested party" under the APA is more efficient for the government procurement process. It fosters the "private attorney-general" theory by granting a greater number of protesters the opportunity to be heard. This theory was first articulated in *Scanwell*[210] and has often been repeated by the courts. One such court was the United States Court of Appeals for the District of Columbia Circuit in *National Federation of Federal Employees v. Cheney*.[211] This court recognized that since a disappointed bidder in a government contract award had standing under the APA, it gave the courts an opportunity to act as a "private attorney general," in order to "prevent the granting of a contract through arbitrary or capricious action" amounting to "illegal [agency] activity."[212]

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[209] *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (*quoting Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152-53 (1970)(alteration in original); *Bennet v. Spear*, 520 U.S. 154, 162 (1997). *See also AFGE, Local 1482*, 46 Fed. Cl. at 596.

[210] *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

[211] 883 F.2d 1038 (D.C. Cir. 1989), *cert. denied*, 496 U.S. 936 (1990).

[212] *Id.* at 1052-53, *quoting Scanwell*, 424 F.2d at 864.

Procurement professionals spend $200 billion dollars annually of taxpayer funds[213]. Therefore, the answer to the poignant, rhetorical question asked by the *Scanwell* court thirty years earlier is even more important today. "If there is arbitrary or capricious action on the part of any contracting [government] official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity?"[214]

### D. Subcontractors Are Interested Parties

The interpretation of who is an interested party under APA standing law is, of course, broader than that under the GAO definition. Under the APA approach to standing, a subcontractor of a bidder on a contract would have an economic interest in the contract award and therefore would be an "interested party."[215]

Judge Andewelt in *ATA*[216] was the first COFC judge to suggest that a disappointed subcontractor may be aggrieved by agency action and "interested" in the

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[213] Steven L. Schooner, *Pondering the Decline of Federal Government Contract Litigation in the United States*, 8 Pub. Proc. L. Rev. 242, 249 (1999).

[214] *Scanwell*, 424 F.2d at 866-67.

[215] *See ATA Defense Industries, Inc. v. United States*, 38 Fed. Cl. 489, 492 (1997).

[216] *Id.*

award[217] and thus have standing under the APA and § 1491(b). According to Judge Andewelt:[218]

> The definition of "interested party" in [the GAO statute arguably is more narrow than the definition that would flow from the application of the plain meaning of Section 1491(b). A party reasonably could be deemed to be interested in the award of a contract even if the party is not an actual or prospective bidder. For example, a subcontractor of a bidder on a contract would have an economic interest in the contract award and therefore would be an "interested party" even though the subcontractor is neither an actual nor prospective bidder.

Arguably the *ATA* analysis is dicta since the court did not have to decide the issue finding that the plaintiff, a prime contractor, had standing even under the narrower CICA definition. However, three years later Judge Horn in another COFC case held that a subcontractor did in fact have standing under § 1491(b).[219]

In *Phoenix*, Judge Horn found that the COFC had jurisdiction to decide a subcontractor's claim that procurement regulations had been violated when the government improperly issued a modification to a contract rather than conducting a competitive procurement for new services. In rejecting the government's argument that a subcontractor was not an interested party, Judge Horn stated that under the

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[217] *See* 5 U.S.C. § 702 (1994) (requiring plaintiff to be "adversely affected or aggrieved by agency action with the meaning of the relevant statute"); *see generally Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970) (requiring "injury in fact" and "interest" within the "zone of interests" protected by the relevant statute). *See also* Claybrook, *supra* note 130, at 46.

[218] *ATA*, 38 Fed. Cl. at 494.

[219] *Phoenix Air Group, Inc. v. United States*, 46 Fed. Cl. 90 (2000).

Tucker Act the protester must (1) be an interested party and (2) allege a "violation of statute or regulation in connection with a procurement or proposed procurement."[220] The court's rationale as to why a subcontractor had standing was based upon its status as a prospective bidder whose economic interest would be affected by not receiving the new contract.[221]

Although there are exceptions, as a rule, courts have not been particularly receptive to granting standing to subcontractors.[222] These courts generally have allowed it only in limited situations usually outlined in GAO precedent.[223]

One such exception is *Superior Services*.[224] The district court judge in this case recognized what all subcontractors know: they are directly affected by the alleged procurement violation because they have entered into a "teaming agreement" with the prime contractor.[225] The judge held that if the prime contractor were awarded

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[220] *Phoenix*, 46 Fed. Cl. at 101.

[221] *Phoenix*, 46 Fed. Cl. at 102 & n13.

[222] *See* Claybrook, *supra* note 130, at 46 n272.

[223] *See Waste Management v. Weinberger*, 862 F.2d 1393 (9th Cir. 1988); *Coyne-Delany Co. v. Capital Dev. Bd.*, 616 F. 2d 341, 342 (7th Cir. 1980)(applying *Scanwell* rationale to state procurement); *Information Sys. & Network Corp. v. United States Dep't of Health and Human Servs.*, 970 F. Supp. 1, 7-9 (D.D.C. 1997).

[224] *Superior Services, Inc., v. Dalton*, 851 F. Supp. 381 (S.D.C.A. 1994).

[225] *Id.* at 388.

the contract, the subcontractor would gain financial benefits and would not suffer losses from having to vacate the premises or liquidate assets.[226]

Granting standing to subcontractors is consistent with the broader interpretation of "interested parties" under an APA analysis. However the realistic future of subcontractors as bid protesters is not so clear. There may be circumstances where a win at the courthouse for the subcontractor is nothing more than a hollow victory.[227] For example, the prime contractor may have decided not to file a bid protest, despite having legal justification, because of a wide variety of reasons unknown to the subcontractor, the agency, or the court. For example, an unsuccessful bidder may have learned that it submitted a below-cost bid or just plain does not want the contract due to its changing needs. Accordingly, this prime contractor would not file a protest and even if the government corrected the alleged violation, would choose not to participate in a recompetition for business reasons. Therefore, most would argue that allowing a subcontractor to protest would be a waste of time and resources for those involved.[228]

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[226] *Id.*

[227] *See* Rebecca E. Pearson, *The Air Force's Experience with the Expanded Bid Protest Jurisdiction in the Court of Federal Claims*, 34 Procurement Lawyer 1, 4-5 (Fall 1998).

[228] *Id.*

While these concerns may be valid,[229] they do not diminish the fact that subcontractors fall squarely within this broader definition of interested parties. It is inappropriate for the courts to somehow tailor standing tests dependent upon the party seeking a review of a governmental action.[230] Judges should treat subcontractors as they would any other plaintiffs. Therefore, a court's determination as to whether a subcontractor has standing to challenge an agency action should depend on whether the subcontractor has standing under the traditional APA standing requirements.[231]

### E. Contract Awardees in Bid Protest Actions should be Granted Intervention

The right of contract awardees to intervene in bid protests is closely related to the issue of standing. With the exception of Judge Weinstein at the COFC, it is the consistent practice of judges at the COFC[232] and the district courts[233] to allow the

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[229] However, it is just as likely to assume that the majority of subcontractors would not waste their own resources in filing a bid protest without having solid grounds for anticipating a favorable outcome.

[230] Nor was this the suggestion of Pearson in her article. *See* Pearson, *supra* note 227.

[231] *See Contractors Eng'rs Int'l, Inc. v. United States Dep't of Veterans Affairs,* 947 F.2d 1298, 1300-02 (5th Cir. 1991)(holding that standing of a subcontractor depends on traditional APA standing requirements). *See also AFGE Local 1482,* 46 Fed. Cl. 58, 593 (2000)(federal district courts exercise jurisdiction over a broad range of plaintiffs claiming standing under the APA).

[232] *See, e.g., Marine Hydraulics Int'l, Inc. v. United States*, 43 Fed. Cl. 664 (1999); *Metric Sys. Corp. v. United States*, 42 Fed. Cl. 306, 307 (1998); *Candle Corp. v. United States*, 40 Fed. Cl. 658 (1998); *Alfa Laval Separation, Inc. v. United States*, 40 Fed. Cl. 215 (1998), *rev'd on*

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awardee of a challenged contract to intervene. This consistency has been true both before and after the enactment of § 1491(b).

Judge Weinstein has repeatedly held that awardees may not intervene but only appear as amici curiae under § 1491(b).[234] These decisions are inconsistent with COFC Rule 24, "Intervention."[235] The language of COFC Rule 24 provides that an awardee may intervene both as of right[236] and by permission.[237] Most of the cases

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*other grounds*, 175 F.3d 1365 (Fed. Cir. 1999); *Blount, Inc. v. United States*, 22 Cl. Ct. 221, 226 (1990); *Vanguard Sec., Inc. v. United States*, 20 Cl. Ct. 90 (1990). *See also* Claybrook, *supra* note 130, at 49 & 50 n.293.

[233] *See, e.g., QualMED, Inc. v. Office of Civilian Health and Medical Programs of the Uniformed Services*, 934 F. Supp. 1227 (D.Colo.1996); *Buffalo Cent. Term. v. United States*, 886 F. Supp. 1031, 1035 (W.D.N.Y. 1995); *Single Screw Compressor, Inc. v. United States Dep't of Navy*, 791 F. Supp. 7 (D.D.C. 1992). *See also* Claybrook, *supra* note 130, at 49 & 50 n.292.

[234] *See Anderson Columbia Envtl., Inc. v. United States*, 42 Fed. Cl. 880, 883-85 (1999); *Advanced Data Concepts, Inc. v. United States*, Order, No. 98-495C, 1998 U.S. Claims LEXIS 326 (Fed. Cl. June 18, 1998); *United Int'l Investigative Servs. Inc. v. United States*, Order, No. 98-153C (Fed. Cl. March 25, 1998).

[235] R.C.F.C. 24. *See also* Claybrook, *supra* note 130, at 49.

[236] R.C.F.C. 24(a) reads as follows:

Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statue of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impeded the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[237] R.C.F.C. 24(b) reads as follows:

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allow awardees to intervene as a matter of right under R.C.F.C 24(a). In accordance with the language of this rule, unless a statute confers an unconditional right to intervene, the awardee must (1) have an interest; (2) be in a position where that interest could be impaired; and (3) show that its interests are not otherwise adequately represented.

Accordingly, in *Anderson Columbia*,[238] the most recent of these cases, Judge Weinstein held that, the would-be intervenor, Tanner, failed to identify a statute giving it an unconditional right to intervene. The judge also found that the government adequately represented Tanner's interest in the action. The final element to Judge Weinstein's mandated intervention rationale was that the disposition of the action will not "as a practical matter impact or impede an applicant's ability to protect that interest."[239] The judge's reasoning was because Tanner can bring its own protest at a later time if its award is set aside and it loses the recompetition.[240]

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Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

[238] *Anderson Columbia Envtl., Inc. v. United States*, 42 Fed. Cl. 880, 883-85 (1999).

[239] R.C.F.C. 24(a).

[240] *Anderson Columbia*, 42 Fed. Cl. at 882.

As for R.C.F.C. 24(b), Judge Weinstein gave three reasons for denying permissive intervention. First, she held that there was no common claim or defense with the disappointed bidder or government. She also stated that there was a presumption of adequate representation by the Department of Justice and lastly that there was no reason to believe that allowing intervention would not unduly delay the bid protest.

After applying the R.C.F.C 24, Judge Weinstein analyzed Tanner's request to intervene under a standing analysis. The judge adopted the GAO's "interested party" definition and found that Tanner was not a party as of right because it is not an actual or prospective bidder or offeror.[241] The court also held that Tanner did not meet the requirement of § 1491 that to be an "interested party," the party must be "objecting" to an award.[242]

The judge's opinion did not consider whether Tanner should have been granted standing as an interested party under the APA. However, it is doubtful that this analysis would have been beneficial to Tanner. After all, as the awardee, Tanner is not an aggrieved party under 5 U.S.C. § 702 (1994).

Despite intervenors' inability to be meet the traditional standing analysis, they should be allowed to intervene under R.C.F.C. 24. Judge Weinstein's decision to deny intervention to contract awardees is a radical departure from the rest of the

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[241] *Id.* at 883-85.

judges at the COFC. Other COFC judges allow and even welcome contract awardee intervention in bid protests. The awardee, not the Department of Justice, has a better grasp of the case surrounding the bid protest action that often involves a complicated fact pattern.

Moreover, the Department of Justice does not have the same interest as the awardee and therefore will not be able to adequately represent the awardee's interest in a bid protest.[243] In deciding how to proceed with the case, the government must consider public policies and procurement exigencies, which may encourage a settlement undesirable to the awardee. The awardee's interests are far simpler. The awardee just wants to do whatever is necessary to keep the contract award.

The fate of intervenors at the COFC, like bid protesters seeking the broader standing analysis under the APA, at least for now will depend on the assignment of the judge. Fortunately, for the intervenors, Judge Weinstein's decisions denying intervention have not been followed by the other judges. Both the COFC and the district courts should continue to grant intervention to contract awardees in bid protest actions.

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[242] *Id.*

[243] *See generally* Claybrook, *supra* note 130, at 51.

## V. CONCLUSION

Federal courts need a consistent approach in determining who qualifies as an interested party pursuant to the amendments to 28 U.S.C.A. § 1491. A consistent approach would standardize the COFC practice with that of the district courts for bid protestors. As a result, bid protesters would have a clearer understanding of what standing challenges they will face in the federal courts. Under one common approach, plaintiffs in similar situations would receive equal treatment. Their ability to seek judicial review of a government contract would depend upon the facts and circumstances surrounding their case rather than the selection of the forum and judge.

Instead of adopting or modifying the GAO definition of interested party, the judges at the COFC should equate interested party status under § 1491(b)(1) with aggrieved party standing under the APA. The CICA definition of "interested party" employed by the GAO is too restrictive. The broader approach of standing under the APA will better serve government procurement interests. By opening the courtroom doors just a little wider, the COFC will promote the private attorney general theory of bid protesters policing the government procurement process. This approach, however, is not so broad as to pack the courts with nuisance suits as evident by the types of cases filed at district courts.

Federal district courts have been applying APA standing law to bid protesters for over thirty years. Importantly, this wealth of experience will be lost if Congress allows the elimination of district court bid protest jurisdiction to occur on January 1,

2001.[244] By adopting the APA approach to standing, the COFC ensures that the district court case precedent is preserved.

[244] *See* Mason, *supra* note 70.